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No. _____

IN THE
Supreme Court of the United States
October Term, 1989

RICHARD DUGGER, Secretary,
Department of Corrections, State of Florida,
ROBERT BUTTERWORTH, Attorney General,
State of Florida,

Petitioner,

v.

THEODORE CHRISTOPHER HARRIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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83 pp

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS ERRED IN FAILING TO GRANT A PRESUMPTION OF CORRECTNESS, UNDER 28 U.S.C. § 2254(d), TO A STATE COURT'S DETERMINATION THAT WITNESSES TESTIFYING AT A STATE COURT POST-CONVICTION RELIEF PROCEEDING WERE NOT CREDIBLE.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 874 F.2d 756 (11th Cir. 1989) and is reprinted in the Appendix hereto. (Pet. App. A. 1-15). The motion for rehearing was denied on August 17, 1989. (Pet. App. A. 16-17).

The decision of the United States District Court for the Southern District of Florida is unreported and reprinted in the Appendix hereto. (Pet. App. A. 18-24).

The decision of the Supreme Court of Florida, relevant to the issue raised herein, is reported at 528 So.2d 361 (Fla.

1988). The opinion is reprinted in the Appendix hereto. (Pet. App. A. 25-39).

The order of the Eleventh Judicial Circuit, in and for Dade County, Florida and findings at an evidentiary hearing in that court are relevant to the issue herein and are unreported. The Circuit Court's order and portions of the evidentiary hearing transcript are reprinted in the Appendix hereto. (Pet. App. A. 40-55).

JURISDICTION

The Eleventh Circuit Court of Appeals opinion was filed on May 16, 1989, and a motion for rehearing was denied on August 17, 1989. This Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The 6th Amendment of the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The 14th Amendment of the United States Constitution provides in relevant part: "Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

28 U.S.C. § 2254(d) provides in relevant part:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . evidenced by a written finding, written opinion, or other reliable and ade-

quate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-

* * *

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

* * *

STATEMENT OF THE CASE

Following a jury trial in 1981, Respondent was convicted of first degree murder, burglary and robbery. *Harris v. Dugger,* 874 F.2d 756, 759 (11th Cir. 1989). (Pet. App. A. 4). The trial judge imposed the death sentence for the murder conviction, in accordance with the jury's advisory recommendation. *Id.* On direct appeal, the convictions and sentence were affirmed by the Supreme Court of Florida. *Harris v. State,* 438 So.2d 787 (Fla. 1983), *cert. denied,* 466 U.S. 963, 104 S.Ct. 2181, 80 L.Ed.2d 563 (1984). The facts of the murder, and the procedural history at trial and direct appeal, are set forth in the Supreme Court of Florida's opinion on appeal from denial of post conviction relief:

> "The victim, a seventy-three-year-old woman, was found dead in her home on the morning of Sunday, March 22, 1981. She had died during the night from multiple stab wounds inflicted by a blunt instrument. A knife, a bloody rock, and a blood-covered wooden chair were found in the house. The autopsy revealed that the victim had suffered numerous defensive wounds on her arms, hands, and shoulders. Blood was spattered over the walls and furnishings of the bedroom, living room, and kitchen, indicating that the victim had tried to escape her assailant while she was being stabbed and beaten."
>
> *Id.* at 789. At the time of the murder, Harris was living with the victim's granddaughter in the same neighborhood. He had previously been married to that granddaughter's sister. Harris had signed a written confession which was fully set forth in our prior opinion. He presented no evidence in his own behalf in the guilt phase of the trial.

> During the penalty phase, the state presented evidence that Harris had been previously convicted of robbery and that he was on parole at the time of the murder. At the conclusion of the penalty phase, defense counsel requested a continuance to bring Harris' ex-wife, other family members, and a minister from Jacksonville to testify in Harris' behalf. When the court reconvened, counsel advised the court the ex-wife was hospitalized and he had been unable to contact the minister. As a result of the unavailability of these witnesses, Harris presented no evidence in mitigation during the penalty phase. We affirmed the imposition of the death sentence and agreed that the following aggravating circumstances applied: (1) Harris was under a sentence of imprisonment when he committed the murder; (2) he had previously been convicted of a felony involving violence; (3) the murder was committed while Harris was engaged in committing a robbery or burglary; and (4) the murder was especially heinous, atrocious, and cruel. We rejected the aggravating circumstance that the murder was committed in a cold, calculated, and premeditated manner, but concluded that the improper finding of this aggravating circumstance did not require a new sentencing proceeding. *Id.* at 798.

Harris v. State, 528 So.2d 361, 361-62 (Fla. 1988) (Pet. App. A. 25-26).

Subsequently, Harris filed a petition for writ of habeas corpus in the Supreme Court of Florida, claiming that he was denied effective assistance of appellate counsel. *Harris v. Wainwright*, 473 So.2d 1246 (Fla. 1985). This claim was rejected. *Id.*

Harris then filed a motion for post-conviction relief in the state trial court, raising multiple issues. (Pet. App. A. 40-41). The trial court rejected fifteen (15) of these issues because they were procedurally barred in that they either: (1) "could have been and should have been raised on direct appeal, but were not and which were not properly preserved by request or objection at trial."; or (2) were previously ruled upon, against the defendant, by the Florida Supreme Court. (Pet. App. A. 40-41). However, the trial court held an evidentiary hearing on the remaining claims alleging ineffective assistance of trial counsel. (Pet. App. A. 40, 43 et seq.). The substance of the latter claims and the testimony of witnesses thereon is summarized by the Supreme Court of Florida as follows:

> . . . [Harris] asserts counsel was ineffective for failing to have presented certain mitigating evidence. He argues that, cumulatively, the testimony from relatives and friends which should have been presented would have established that Harris was a kind, decent man dedicated to his family, a warm and loving parent, a good provider, a timid person and not the kind who would ever harm anyone, a regular church-goer, a dependable and trustworthy employee, and a loyal and valued friend.
>
> He also argues that his school and military records should have been presented to the jury to demonstrate, inter alia, that during his service in the army Harris was commended for assisting the Red Cross in a blood drive on one day. He received a commendation letter thanking him and seven other servicemen for assisting the driver in setting up and breaking down the mobile blood unit.

Harris v. State, supra, at 528 So.2d 363-64 (Pet. App. A. 29).

The trial court judge who heard the testimony presented by these friends and relatives, found:

> With regard to the witnesses that the Court heard today, I cannot by any stretch of the imagination believe that the jury would have been influenced by their testimony to reach any conclusion other than the one that they reached in their verdict.
>
> I share with Mr. Gilbert the feeling—I'm trying to say incredibleness, which is of course not a word—lack of believability or acceptance of statements by some of the witnesses as to what a good fellow Mr. Harris was, as to what a fine person he was, what a role model he was when he had the background that he did, which seemed to come as a surprise to some of the witnesses.
>
> They knew he had had brushes with the law, but when the exact extent of those brushes with the law was brought to their attention, although they stayed strong and continued to say, "Oh, yes, he's a good fellow and I love him and I'll stand by him," that they were a bit shocked with what they heard today.

(Pet. App. 54-55).

Some of the testimony heard by the trial court at the evidentiary hearing is pertinent to the above finding. For example, witness Henry Fuller, the respondent's brother-in-law, had testified that he could see Harris as a role model for his children (Pet. App. A. 44) and that Harris would never hurt anybody. (Pet. App. A. 45). However, this witness did not know that the victim herein was a 73 year old woman whom Harris cut fifty (50) times. (Pet. App. A. 46). This witness did not know that Harris had been previously convicted of drug possession and robbing an elderly woman (in

the latter incident the woman's arm was broken). (Pet. App. A. 45-46). Moreover, his response as to how one reconciles the force and violence required in a robbery was: "So does love. . . ."! (Pet. App. A. 45-46).

Witness Carswell, who is a minister, testified that Harris was a good family man who attended the church and whom he would trust with his own family. (Pet. App. A. 48-52). However, this witness did not know about Harris' previous convictions of drug possession, assault and battery, or robbery. (Pet. App. A. 49-51). He didn't know the victim killed by Harris was the grandmother of the woman who had befriended him and who had given him a place to stay. (Pet. App. A. 29, 52). Carswell could not explain why Harris would inflict fifty knife wounds in order to take $30 from a member of the church. (Pet. App. A. 52).

Witness LaShawn Fuller, the Respondent's niece, testified that Harris was a good advisor for her during her career. (Pet. App. A. 48). This witness, however, was only fifteen years old at the time of Harris' sentencing (Pet. App. A. 47) and had no career!

The trial court, in accordance with the aforesaid findings, denied post-conviction relief on the grounds that no prejudice had been established and that "trial counsel did not commit any deficiency below the standards expected of counsel." (Pet. App. A. 40-41, 54-55).

Harris appealed the above denial to the Supreme Court of Florida. The Court, having first noted the trial court's findings, stated the criteria for granting relief, quoting from *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in part, as follows:

> Further, "[w]hen a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the

> sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S.Ct. at 2068.

Harris v. State, supra, 528 So.2d at 363 (Pet. App. A. 28).

The Court then affirmed the denial of post-conviction relief, addressing the "good character" evidence argued by Harris and holding:

> To this evidence the state could respond that when Harris committed this murder, he was burglarizing the home of the grandmother of the woman who had befriended him and given him a place to stay. Further, that his military records show he was undesirably discharged and had been absent without leave on several occasions. Additionally, that evidence would allow the state to present evidence that Harris had been convicted of two prior burglaries and a robbery in which he broke an elderly woman's arm while snatching her purse. These circumstances, coupled with the statutory aggravating circumstances, including the fact that this seventy-three-year-old woman had six stab wounds and forty-one incision wounds caused by a knife and five lacerations caused by a blunt instrument, overwhelm the suggested mitigating evidence. We conclude there is no reasonable probability the omitted mitigating evidence would have affected the jury's recommendation or the sentence imposed by the trial judge.

Harris v. State, supra, 528 So.2d at 364. (Pet. App. A. 29-30).

Respondent then filed a petition for writ of habeas corpus in the United States District Court for the Southern District

of Florida. (Pet. App. A. 18). He raised, *inter alia,* the same claims of ineffective assistance of counsel. (Pet. App. A. 20-22). The District Court denied the application for writ of habeas corpus. (Pet. App. A. 24). With respect to the claim of ineffective assistance of counsel, the District Court found:

> While the two lawyers representing Harris seemed to have thought that the other was responsible for the preparation for the penalty hearing, it is clear that some efforts were made to produce witnesses. More, perhaps, could have been done. But there is no proof that such additional efforts would have produced a different result. Perfection in preparation and presentation is not required by the United States Constitution.

(Pet. App. A. 23).

Harris then appealed to the United States Court of Appeals for the Eleventh Circuit. *Harris v. Dugger, supra.* (Pet. App. A. 1-17). The Court of Appeals first found that trial counsels' performance was deficient because they did not investigate Harris' "family, scholastic, military and employment" background. *Id.* at 763. (Pet. App. A. 12-13). The Court of Appeals then stated that as a result, the sentencing jury:

> . . . did not know that family members would contend that Harris was a devoted father, husband and brother. They did not know that these relatives and a minister would describe Harris as a decent loving man whose life was important to them.

Id. at 763. (Pet. App. A. 13).

The Court of Appeals, ignoring the state court's finding as to the credibility of these witnesses, concluded: "Because we find that a reasonable probability exists that a jury hearing

this [good character] evidence would have recommended life, Harris suffered prejudice from counsel's errors." *Id.* at 764. (Pet. App. A. 15). The Court of Appeals thus concluded that the writ of habeas corpus must be granted insofar as the death penalty is concerned, subject to the holding of a new sentencing proceeding within a reasonable period of time to be set by the district court. *Id.* (Pet. App. A. 15). In all other respects, the order of the district court was affirmed. *Id.*

REASON FOR GRANTING THE WRIT

THE FAILURE OF THE COURT OF APPEALS TO GRANT A PRESUMPTION OF CORRECTNESS, UNDER 28 U.S.C. 2254(d), TO THE STATE COURT'S DETERMINATION THAT WITNESSES TESTIFYING AT A POST-CONVICTION RELIEF PROCEEDING WERE NOT CREDIBLE, CONFLICTS WITH DECISIONS OF THIS COURT.

The United States Court of Appeals held that deficient conduct of counsel at the sentencing phase of Harris' trial caused Harris prejudice, because, "a reasonable probability exists that a jury hearing this evidence [of good character of the defendant] would have recommended life. . . ." *Harris v. Dugger, supra,* 874 F.2d at 764. (Pet. App. A. 15). Whereas the Court of Appeals treated the testimony of the defendant's family and friends as having proven good character, the state trial court judge, who heard this testimony in a post-conviction evidentiary hearing, expressly rejected the testimony of these witnesses, because she found them "incredible", based partially upon their demeanor on the witness stand and the inconsistencies in their testimony. (Pet. App. A. 54-55).

A state court's credibility determination as to witnesses is a factual issue which carries a presumption of correctness under 28 U.S.C. § 2254(d). *Marshall v. Lonberger,* 459 U.S. 422, 432, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983). *See also, Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Rushen v. Spain,* 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1984). Ineffective assistance of counsel is "a mixed question of law and fact." *Strickland v. Washington,* 466 U.S. 660, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, a "state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of [28 U.S.C.] § 2254(d), ..." *Id.* A federal

court, on habeas corpus review, can not reject such a factual finding and come to its own conclusions on the basis of fact findings in conflict with those made by the state courts, unless, the federal court provides "a written explanation of the reasoning . . ." which led to the rejection of the state court's finding of facts. *Sumner v. Mata,* 455 U.S. 591, 593, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982).[1] The Court of Appeals did not even mention the state court's finding that the witnesses testifying to the defendant's "good character" were not credible, let alone provide an explanation for the rejection of this finding. Thus, conflict exists between the Court of Appeals' decision and *Lonberger, supra, Sumner, supra, Witt, supra,* and *Rushen, supra.*

In *Lonberger,* in the state court trial on aggravated murder charges, the prosecution introduced evidence of Lonberger's prior guilty plea in an earlier attempted murder case. Evidence of the prior offense was relevant with respect to the propriety of the imposition of the death sentence. Lonberger maintained that his earlier guilty plea was involuntary. Prior to the trial on the murder charges, a state court hearing had been held to determine whether the prior plea was voluntary. Lonberger testified at that hearing. The state court, in finding that the prior plea was voluntary, thereby enabling its use in evidence at the subsequent murder trial, did not explicitly state that it found Lonberger's testimony lacking in credibility. Lonberger had testified that he had "copped out to aggravated battery" in

1 "The statute [28 U.S.C. § 2254(d)] explicitly provides that 'a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct.' Only when one of seven specified factors is present or the federal court determines that the state-court finding of fact 'is not fairly supported by the record' may the presumption properly be viewed as inapplicable or rebutted." *Sumner v. Mata,* 455 U.S. at 592.

the earlier case, but did not know of the other charges as to which he pled, including, *inter alia,* attempted murder. 459 U.S. at 432-33. The prosecutors attempted to impeach his testimony by introducing a copy of the indictment, which Lonberger denied having seen before. The prosecutors also emphasized that Lonberger must have heard of the attempted murder charge at the arraignment or in conversations with his attorneys. *Id.*

The Court of Appeals, in finding the plea involuntary, relied on Lonberger's testimony. *Id.* at 433. This Court found that the Court of Appeals' reliance on Lonberger's discredited testimony was erroneous:

> We are unsure whether the Court of Appeals' reassessment of the effect of respondent's testimony at the Ohio state trial court hearing was undertaken because of the failure of the trial court to make express findings as to respondent's credibility, or whether the Court of Appeals for the Sixth Circuit felt that it should assess for itself the weight that such evidence should have been accorded by the state trial court. In either event, we hold that it erroneously applied the "fairly supported by the record" standard enunciated in 28 U.S.C. § 2254(d).

459 U.S. at 433. Had Lonberger's testimony been believed, the state trial court obviously would have refused to permit the prior guilty plea to be introduced at the murder trial. *Id.* at 433-34. Thus, the state court's ruling allowing the use of the prior conviction was "tantamount to a refusal to believe the testimony of the respondent." *Id.* at 434. This Court then proceeded to conclude that the state court's finding regarding Lonberger's lack of credibility was fairly supported by the record and was entitled to deference by the federal courts.

The foregoing principles are seen again in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). That decision held that a state court's determination that a prospective capital sentencing juror was properly excused for bias was a finding of fact and was entitled to the presumption of correctness under 28 U.S.C. § 2254(d). This Court, quoting *Patton v. Yount*, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984), noted that a finding regarding a venireman's state of mind "is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." 469 U.S. at 428. Such determinations were entitled to deference both on direct review and in habeas proceedings. *Id.* The determination of "juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record. These are 'factual issues' that are subject to § 2254(d)." *Id.* at 429. So too, in the instant case, the credibility determinations were "factual issues" entitled to deference under § 2254(d).

Similiarly, in *Rushen v. Spain*, 464 U.S. 114, 121 at n. 6, 104 S.Ct. 453, 78 L.Ed.2d 267 (1984), it was held that, "Title 28 U.S.C. § 2254(d) provides that the state courts' determinations about witness credibility and inferences to be drawn from the testimony were binding on the District Court and are binding on us." *Rushen* involved a post-trial state court hearing in which it was concluded that ex parte communications between the judge and a juror did not prejudice the defendant and were harmless. The lower federal courts had erred in failing to defer to the presumptively correct state court finding that the jury's deliberations, as a whole, were not biased by the previously undisclosed communication of one juror's recollection. *Id.* at 121.

A federal court's deference to state court factual findings is at least as great as the deference a federal appellate court must grant to a federal district court's factual findings. *Witt, supra*, 469 U.S. at 428. In this context, *Amadeo v. Zant*, 486

U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988), must be noted. There, the federal appellate court rejected factual findings made by the federal district court in an evidentiary hearing. This Court, quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), emphasized that " '[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' " 100 L.Ed.2d at 262. Moreover, the Court of Appeals could not set aside the district court's factual findings where there was sufficient evidence in the record, considered in its entirety, to support those findings. 100 L.Ed.2d at 264. A state court's findings of fact are entitled to at least the same level of deference, if not greater.

In the instant case, the state trial court expressly found that the witnesses as to the defendant's "good character" were not credible, based both on their in-court demeanor and the inconsistencies in their testimony. (Pet. App. A. 54-55). The state court's finding is fairly supported by the record. The state court judge who heard these witnesses testify, found:

> With regard to the witnesses that the Court heard today, I cannot by any stretch of the imagination believe that the jury would have been influenced by their testimony to reach any conclusion other than the one that they reached in their verdicts.
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> *I share with Mr. Gilbert the feeling—I'm trying to say incredibleness, which is of course not a word—lack of believability or acceptance of statements by some of the witnesses as to what a good fellow Mr. Harris was, as to what a fine person he was, what a role model he was when he had the background that he did, which seemed to come as a surprise to some of the witnesses.*

> *They knew he had had brushes with the law, but when the exact extent of those brushes with the law was brought to their attention, although they stayed strong and continued to say, "Oh, yes, he's a good fellow and I love him and I'll stand by him," that they were a bit shocked with what they heard today.*

(Pet. App. A. 54-55) (emphasis added).

The above findings are fairly supported by the record. For example, witness Henry Fuller testified that he could see Harris as a role model for his children (Pet. App. A. 44) and that Harris would never hurt anybody. (Pet. App. A. 45). However, this witness did not know that the victim herein was a 73 year old woman whom Harris cut fifty (50) times. (Pet. App. A. 46). This witness did not know that Harris had been previously convicted of drug possession and robbing an elderly woman (in the latter incident the woman's arm was broken). (Pet. App. A. 45-46). Moreover, his response as to how one reconciles the force and violence required in a robbery was: "So does love. . . ."! (Pet. App. A. 45-46).

Witness Carswell, who is a minister, testified that Harris was a good family man who attended the church and whom he would trust with his own family. (Pet. App. A. 48-52). However, this witness did not know about Harris' previous convictions of drug possession, assault and battery, or robbery. (Pet. App. A. 49-51). He didn't know the victim killed by Harris was the grandmother of the woman who had befriended him and who had given him a place to stay. (Pet. App. A. 52, 29). Carswell could not explain why Harris would inflict fifty knife wounds in order to take $30 from a member of the church. (Pet. App. A. 52).

Witness LaShawn Fuller testified that Harris was a good advisor for her during her career. (Pet. App. A. 48). This

witness, however, was only fifteen years old at the time of Harris' sentencing (Pet. App. A. 47) and had no career!

In addition to the trial judge's findings as to the demeanor and credibility of witnesses, the Supreme Court of Florida found the following:

> . . . He [Harris] argues that, cumulatively, the testimony from relatives and friends which should have been presented would have established that Harris was a kind, decent man dedicated to his family, a warm and loving parent, a good provider, a timid person and not the kind who would ever harm anyone, a regular church-goer, a dependable and trustworthy employee, and a loyal and valued friend.
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> He also argues that his school and military records should have been presented to the jury to demonstrate, inter alia, that during his service in the army Harris was commended for assisting the Red Cross in a blood drive on one day. He received a commendation letter thanking him and seven other servicemen for assisting the driver in setting up and breaking down the mobile blood unit.
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> To this evidence the state could respond that when Harris committed this murder, he was burglarizing the home of the grandmother of the woman who had befriended him and given him a place to stay. Further, that his military records show he was undesirably discharged and had been absent without leave on several occasions. Additionally, that evidence would allow the State to present evidence that Harris had been convicted of two prior burglaries and a robbery in which he broke an elderly woman's arm while snatching her purse.

Harris v. State, supra, 528 So.2d at 364. (Pet. App. A. 29).

In reliance upon the above underlying factual bases the Supreme Court of Florida concluded:

> These circumstances, coupled with the statutory aggravating circumstances, including the fact that this seventy-three-year old woman had six stab wounds and forty-one incision wounds caused by a knife and five lacerations caused by a blunt instrument, overwhelm the suggested mitigating evidence. We conclude there is no reasonable probability the omitted mitigating evidence would have affected the jury's recommendation or the sentence imposed by the trial judge.

Harris v. State, supra, 528 So.2d at 364. (Pet. App. A. 29-30).

In contrast to the underlying factual findings utilized by the state courts, the Eleventh Circuit Court of Appeals concluded that prejudice had been established because:

> They [the jury] did not know that the family members would contend that Harris was a devoted father, husband and brother. They did not know that these relatives and a minister would describe Harris as a decent, loving man whose life was important to them. . . .

Harris v. Dugger, supra, at 763. (Pet. App. A. 13). The Court of Appeals entirely omitted any reference to the credibility of these witnesses as found by the state trial judge and the circumstances of the offense as found by the state Supreme Court. Instead of treating the "good character" testimony of Harris' friends and family as unbelievable and inconsistent, as the state courts did, the Court of Appeals treated it as unrebutted proof of good character. Thus rejecting the state court's factual finding for no reason, the Court concluded that the jury in Harris' sentencing phase would have recom-

mended life, thereby establishing prejudice. The Court of Appeals gave no reasons for its rejection of the State court's explicit findings. The Court of Appeals' decision is therefore in conflict with *Sumner, supra, Lonberger, supra, Witt, supra,* and *Rushen, supra.*

The significance of the foregoing goes well beyond the mere issue of whether certain witnesses are credible. The issue goes to the heart of the federal judicial structure. Inherent in the Court of Appeals' decision is the notion, repugnant to the state-federal judicial dichotomy, that federal courts alone are competent to determine the credibility of state court witnesses, witnesses who did not even appear in federal court. As noted by this Court in *Lonberger:*

> '. . . "Face to face with living witnesses the original trier of facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal." *Boyd v. Boyd,* 252 NY 422, 429.' *Id.,* at 339.
>
> We greatly doubt that Congress, when it used the language "fairly supported by the record" . . . intended to authorize broader federal review of state-court credibility determinations than are authorized in appeals within the federal system itself.

459 U.S. at 434-35. The federal appellate court in the instant case engaged in its own factfinding, egregiously ignoring the factual findings explicitly made by the state trial court. Such disrespect for the state judiciary's factfinding determinations manifestly repuditates the long line of authority enun-

ciated by this court. *Lonberger, supra; Witt, supra; Rushen, supra.* The mode of analysis utilized by the Court of Appeals therefore raises the spectre of further unwarranted intrusion into the state judiciary's domain.

CONCLUSION

Based on the foregoing reasons, the Petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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No. _____

IN THE

Supreme Court of the United States

October Term, 1989

RICHARD DUGGER, Secretary, Department of Corrections, State of Florida,
ROBERT BUTTERWORTH, Attorney General, State of Florida,

Petitioner,

vs.

THEODORE CHRISTOPHER HARRIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-5612

THEODORE CHRISTOPHER HARRIS,
Petitioner-Appellant,
versus
RICHARD DUGGER, Secretary, Department of Corrections,
State of Florida,
ROBERT BUTTERWORTH, Attorney General,
State of Florida,
Respondents-Appellees.

Appeal from the United States District
Court for the Southern District of Florida

(May 16, 1989)

Before: HILL, VANCE and ANDERSON, Circuit Judges.
HILL, Circuit Judge:

Theodore Christopher Harris, a Florida prisoner convicted of first-degree murder and sentenced to death, appeals the denial of his petition for the writ of habeas corpus. The issues presented are whether the appellant's confession resulted from an illegal arrest and police coercion, in violation of the Fourth and Fourteenth Amendments, and whether Harris' lawyers rendered ineffective assistance of counsel during the penalty phase of his trial, in violation of the Sixth and Fourteenth Amendments.

I.

The victim, Essie Daniels, a seventy-three year old woman, was found dead in her Miami home on the morning of March 22, 1981. An autopsy revealed that she had been stabbed approximately fifty times and had been beaten with a blunt instrument. Police officers found blood spattered over the walls and furnishings of the bedroom, living room and kitchen, indicating that Daniels had attempted to escape the assailant while she was being attacked. A subsequent criminal investigation focused on Theodore Harris as a suspect, and on April 14, 1981, the police arrested the appellant pursuant to a warrant. Harris first denied his involvement in the murder, but after a six hour interrogation, he confessed to having killed the victim.

Harris told the police that he had gone to the victim's home in order to rob her, not to kill her. Upon entering the home, however, Essie Daniels, carrying a kitchen knife in her hand, confronted Harris. A violent struggle ensued, and the victim struck the appellant with the knife first, severely lacerating his hand. Harris then seized the knife, whereupon he repeatedly stabbed the victim. After the attack ended, Harris proceeded to the victim's bedroom, emptied her pocket book, and took approximately $30.

On April 28, 1981, a Dade County, Florida, grand jury indicted Harris for murder in the first degree, as well as for

burglary with assault and robbery. Prior to trial, the defense moved to suppress the appellant's confession, and the judge held an evidentiary hearing. At that hearing, Harris argued that the confession had resulted from an unlawful arrest and police coercion. In attacking the arrest, the appellant relied on *Franks v. Delaware*, 438 U.S. 154 (1978), contending that the investigating police officer had made deliberate misrepresentations of material facts in the affidavit of probable cause used to obtain the arrest warrant.[1] The court rejected this claim, however, finding that *Franks* had not been satisfied since "there was no deliberate falsity or reckless disregard by the investigating police agencies . . . . Moreover, assuming arguendo, there even was a falsity or disregard, there remains sufficient contents within the warrant affidavit to support a finding of probable cause."

The appellant also challenged the legality of the confession by arguing that it was involuntary. Evidence at the suppression hearing established that at the time of arrest, Harris had a cast on his right forearm which interfered with his wrists being handcuffed behind his back, as police regulations required. So, the police handcuffed Harris' right elbow to his left wrist behind his back. The appellant re-

1 In *Franks*, the Supreme Court held "that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the fact of the affidavit." 438 U.S. at 155-56.

mained handcuffed while sitting in an aluminum chair throughout the six hour interrogation. Harris testified that during this time the police beat, tortured and threatened him to obtain his confession. However, police officers testifying for the state denied that Harris had been physically or emotionally abused in any way. The officers stated that Harris stayed calm, unemotional throughout the interrogation, that he never complained of discomfort or pain and did not request an attorney although receiving the warnings mandated by *Miranda v. Arizona*, 384 U.S. 436 (1966), several times. The state court found the officers' version of the interrogation more credible and concluded that Harris had confessed voluntarily.

Harris neither testified nor did the defense call any witnesses during the guilt-innocence phase of the trial. The jury convicted the appellant of first-degree murder, burglary and robbery. During the penalty phase of the trial, the state presented medical testimony concerning the nature of the victim's injuries and the resulting pain that she had suffered. The state introduced additional evidence that Harris had previously been convicted of robbery and was on parole at the time of the murder. Harris presented no evidence in mitigation or rebuttal. Subsequently, the jury rendered a recommendation of death by a vote of eight to four, and the judge imposed the death penalty.[2] The Supreme Court of Florida affirmed the convictions and the death sentence. *Harris v. State*, 438 So.2d 787 (Fla. 1983), *cert. denied*, 466

2 The trial court found the following aggravating circumstances: (1) Harris was under a sentence of imprisonment when he committed the murder; (2) he had previously been convicted of a felony involving violence; (3) Harris committed the murder while engaged in a robbery or burglary; (4) the murder was especially heinous, atrocious and cruel; and (5) Harris committed murder in a cold, calculated and premeditated manner. The Supreme Court of Florida rejected the last aggravating circumstance as unsupported by the evidence. However, the court held that the improper finding did not require a new sentencing hearing. *Harris v. State*, 438 So.2d 787, 798 (Fla. 1983), *cert. denied*, 466 U.S. 963 (1984).

U.S. 963 (1984). The court agreed that Harris had not satisfied *Franks v. Delaware* in proving an unlawful arrest and found that the record supported the trial court's conclusion that the confession was voluntary. *Id.* at 793-94. Thereafter, Harris filed a petition for the writ of habeas corpus in the Supreme Court of Florida alleging ineffective assistance of appellate counsel which the court denied. *Harris v. Wainwright,* 473 So.2d 1246, 1247 (Fla. 1985).

The appellant then filed a motion for post-conviction relief in the state trial court pursuant to Florida Rule of Criminal Procedure 3.850. He alleged, *inter alia,* that his two trial lawyers, Alfred Williams and Pedro Echarte, had rendered ineffective assistance of counsel during the penalty phase of his trial by failing to investigate, prepare or present any mitigation evidence. The state court held an evidentiary hearing in June, 1988, at which Williams and Echarte testified. Both lawyers stated that neither one of them had properly investigated Harris' background. Neither lawyer had obtained Harris' school or military records. Neither one had traveled to Jacksonville, Florida, Harris' hometown, to meet the appellant's parents, sister, brother-in-law, niece, friends, employers and neighbors to learn whether they could offer beneficial mitigation evidence. In fact, the lawyers' testimony demonstrated that, prior to the day of sentencing, neither had performed any investigation in advance for the penalty hearing. Their testimony indicates that their failure to investigate occurred because each believed that the other was preparing the penalty phase of the trial:

> Q. Now, Mr. Williams, who was responsible for the preparation of the penalty phase of this case as between yourself and Mr. Echarte?
>
> A. Mr. Echarte.
>
> . . . .

> Q. Mr. [Echarte], between you and Mr. Williams, which of you was responsible for the preparation of the penalty phase in this trial?
>
> A. Mr. Williams.

Other testimony indicated that the lawyers employed an investigator to assist them in preparing the Harris case. However, no evidence demonstrated that Williams or Echarte ever received or relied on background information developed by the investigator concerning the penalty phase. Williams testified, for example, that he assumed that Echarte and the investigator were working jointly to develop mitigation evidence. But, Echarte testified to the contrary, stating that he neither assigned the investigator to research Harris' background nor did the work himself.[3]

As a result, the lawyers had no evidence to offer in mitigation at the commencement of the sentencing hearing on Saturday, September 26, 1981. Williams thus requested a

3 Williams gave the following testimony concerning the investigator, Gary Wayne:

> Q. Now, during the course of your preparation of the trial phase and the penalty phase, you were receiving reports from either Mr. Echarte or from your investigator, Mr. Wayne, that contacts were being made with family members, correct?
>
> A. Yes.
>
> Q. And that they were developing a background history for your client for the penalty phase?
>
> A. *That's what I assumed was taking place, yes.* (Emphasis added)
>
> Q. That's what they told you was taking place, was it not?
>
> A. Well, the penalty phase was assigned to Pedro [Echarte] and he was to work it up. I got reports in the interim that he had talked to certain people, certain things were coming, certain things were not developing.
>
> Q. They were not developing, but the efforts were being made to develop them by both your investigator and Mr. Echarte?
>
> A. As far as I know, yes.

But Echarte explained that his co-counsel's assumptions were incorrect:

> Q. Mr. Echarte, during the course of your representation of Mr. Harris, did you at any time confer with Mr. Harris' family?

continuance, which the court granted until Tuesday, September 29. In that time, the record demonstrates that the attorneys attempted to contact Harris' ex-wife and one of his Miami friends to obtain some mitigation testimony. However, the ex-wife's hospitalization in Jacksonville precluded her from appearing at the penalty hearing and the friend, according to Williams, refused to testify. The record is unclear as to whether the lawyers made any other attempts to contact witnesses. Thus, at the Tuesday hearing, no friends or relatives testified on Harris' behalf, and Williams explained the absence of family members to the sentencing jury in his closing statement by stating that Harris' "family has turned against him because he was accused of this act."

However, at the Rule 3.850 hearing in state court, the appellant contended that Williams had mischaracterized the Harris family's feelings about the appellant. Harris presented witnesses, including his sister, brother-in-law, niece, ex-wife and a minister, who stated that they would

> A. No.
>
> . . . .
>
> Q. Did you at any time during representation of Mr. Harris confer with or speak to any of Mr. Harris' former employers or friends?
>
> A. No.
>
> . . . .
>
> Q. Mr. Echarte, did you ever go to Jacksonville to visit the Harris family?
>
> A. No.
>
> Q. Did you ever visit the neighborhood where Mr. Harris grew up?
>
> A. I did not.
>
> Q. *Did you ever assign an investigator to do so on your behalf?*
>
> A. *I did not.* (Emphasis added)
>
> Q. Mr. Echarte, did you ever spend time sitting with Mr. Harris to discuss his background and his personal history in preparation for the penalty phase?
>
> A. I did not.

have gladly testified at the sentencing hearing on Harris' behalf. With the exception of Harris' ex-wife, who had been hospitalized at the time of the hearing, the witnesses blamed their absence on the fact that neither of Harris' lawyers nor the investigator had contacted them in regard to the penalty phase. The witnesses also stated that, given the opportunity, they would have described Harris to the sentencing jury as a kind, decent man, a dependable employee, a family man, dedicated to his son, his niece and his ex-wife's other children. All of the witnesses found value in the appellant's life, despite his incarceration and prior criminal conduct. Echarte testified at the Rule 3.850 hearing that he would have presented these witnesses at sentencing had he known about their existence. Williams stated that the failure to seek out this evidence constituted ineffective assistance of counsel.[4]

The state trial court denied Harris' motion for post-conviction relief, finding that counsel had rendered effective assistance, and the Supreme Court of Florida affirmed. *Harris v. State,* 528 So.2d 361 (Fla. 1988). Harris subsequently filed a petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the District Court for the Southern District of Florida. The district court also denied relief, finding that the affidavit of probable cause did not violate *Franks v. Delaware* and that Harris had confessed voluntarily. The district court also concluded that Harris' lawyers had rendered adequate assistance of counsel during the penalty phase. This appeal ensued.

4 Williams' concessions might be construed as reflecting biac. On cross-examination, Williams stated his opposition to the death penalty. He was a public defender, had defended a number of capital cases and Harris was his only client to have reached death row. However, given the state trial judge's endorsement of the lawyer's ability during the Rule 3.850 hearing, we do not, and cannot, second-guess the credibility of Williams' statements. Moreover, because ineffectiveness is a question which we must decide, admissions of deficient performance by attorneys are not decisive.

II

A. The Confession

Appellant contends that the confession was the fruit of an illegal arrest because a police investigator submitted a false and misleading affidavit of probable cause. While not saying so expressly in the brief, Harris raises the *Franks* Fourth Amendment issue once again. However, Harris has fully and fairly litigated this claim in the state courts of Florida. Thus, under the principles of *Stone v. Powell*, 428 U.S. 465 (1976), federal habeas review of this claim is precluded. As the Court stated in *Stone*, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 494 (footnotes omitted). Accordingly, the district court erred in considering the appellant's *Franks* claim. The Florida courts' conclusions that Harris' arrest comported with the Fourth Amendment resolved this issue. *See also Cardwell v. Taylor*, 461 U.S. 571 (1983) (holding the *Stone* preclusion applicable to confessions challenged on Fourth Amendment grounds); *Williams v. Brown*, 609 F.2d 216 (5th Cir. 1980) (*Stone* prevented federal habeas review of a *Franks v. Delaware* claim).[5]

Next, the appellant claims that the police engaged in a coercive, protracted interrogation, vitiating the voluntariness of his confession. Our analysis begins with the well-settled rule that the Due Process Clause of the Fourteenth Amendment prohibits the government's use of involuntary confessions. *Miller v. Fenton*, 474 U.S. 104, 109 (1985); *Leon*

5 The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

v. Wainwright, 734 F.2d 770, 772 (11th Cir. 1984). A confession is voluntary if, under the totality of the circumstances, it is the product of the defendant's free and rational choice. *Id.* This means that the confession must not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, or by the exertion of any improper influence. *Id.* Although the ultimate issue of voluntariness is a legal question requiring independent federal determination, state court findings of fact are afforded a presumption of correctness under 28 U.S.C. § 2254(d).[6] *Miller,* 104 U.S. at 112. As the Court stated in *Miller,* "... subsidiary factual questions, such as ... whether in fact the police engaged in the intimidation tactics alleged by the defendant ... are entitled to the § 2254(d) presumption." *Id.*

In rejecting Harris' motion to suppress the confession, the state trial court found that the police had not threatened, beaten, tricked or harmed the appellant in any way and that pictures taken of him shortly after giving the confession confirmed the absence of physical harm. The court also concluded that Harris' demeanor throughout the interrogation remained calm, and that although he received three sets of *Miranda* warnings, he did not request an attorney. Also, the court found that Harris read and made corrections on his written confession, evidencing a desire to confess. Because these factual determinations are fairly supported by the record, we must afford them a presumption of correctness under 28 U.S.C. § 2254 (d). *Miller,* 474 U.S. at 112. Consequently, accepting the state court's findings as fact, we conclude that Harris gave a voluntary and reliable confession.[7]

6 28 U.S.C. § 2254(d) establishes a presumption of correctness for "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia ...."

B. Ineffective Assistance of Counsel

The Sixth Amendment guarantees a criminal defendant the right of effective assistance of counsel during a capital sentencing hearing. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). Appellant claims that his lawyers' failure to investigate, prepare and present mitigation evidence tending to show his good character denied him this right. Our analysis under *Strickland* has two components: First, Harris must show that his lawyers rendered deficient performance by specifying acts and omissions which allegedly fell outside the wide range of professionally competent assistance. *Id.* at 687-90. Second, Harris must demonstrate that the deficient performance prejudiced the defense. *Id.* at 687. That is, the appellant must show that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine our confidence in the outcome. *Id.* at 694.

The state contends that the appellant has failed to prove either deficient performance or prejudice. It argues that Williams and Echarte relied on their investigator in preparing for the penalty phase, and such reliance, as opposed to interviewing the witnesses themselves, was not an unreasonable performance.[8] As to prejudice, the state contends that the introduction of evidence of appellant's good character through testimony of his relatives and friends would have provided a "springboard" for the prosecutor to inquire

7 We also reject Harris' request for an evidentiary hearing concerning the voluntariness of his confession since he had a full and fair opportuity to present all of his evidence at the state court suppression hearing.

8 The state judge presiding over the Rule 3.850 hearing and the district judge found this argument to be persuasive in holding that Harris' lawyers had rendered effective assistance of counsel.

into Harris' numerous prior crimes. Those prior crimes include convictions for burglary, assault and battery, a drug offense and a robbery in which the appellant broke an elderly woman's arm by snatching her purse. In addition, Harris' military records disclose that he received an undesirable discharge from the Army. Thus, the state urges that Harris suffered no prejudice from the omission of mitigation evidence since the prosecutor was prevented from introducing evidence of Harris' unfavorable record.

An attorney is not obligated to present mitigation evidence if, after reasonable investigation, he or she determines that such evidence may do more harm than good. *Smith v. Dugger,* 840 F.2d 787, 795 (11th Cir. 1988). Moreover, the attorney is not necessarily required to investigate every evidentiary lead; an attorney's decision to limit his or her investigation may be reasonable under the circumstances. *Strickland,* 466 U.S. at 691. However, such decisions must flow from an informed judgment. Here, counsel's failure to present or investigate mitigation evidence resulted not from an informed judgment, but from neglect. Each lawyer testified that he believed that the other was responsible for preparing the penalty phase of this case. Thus, prior to the day of sentencing, neither lawyer had investigated Harris' family, scholastic, military and employment background, leading to their total—and admitted—ignorance about the type of mitigation evidence available to them. Such ignorance precluded Williams and Echarte from making strategic decisions on whether to introduce testimony from Harris' friends and relatives. We conclude, therefore, that the lawyers rendered inadequate assistance of counsel. *See Blake v. Kemp,* 758 F.2d 523, 533 (11th Cir.), *cert. denied,* 474 U.S. 998 (1985) ("It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness.")

In reaching our conclusion, we reject the state's contention that counsel based a strategy on information supplied to them by an investigator. The record simply does not support the state's position. Williams, who admittedly did not investigate Harris' background, *assumed* that Echarte and the investigator were developing background information. However, Echarte's testimony that he neither labored with an investigator nor accomplished the work himself belies the accuracy of Williams' assumption.

Yet, if the failure to investigate did not deprive the appellant of beneficial evidence, there may be inadequate assistance but no prejudice and thus no constitutional deprivation. *Strickland,* 466 U.S. at 691-92. Here, the prejudice component in *Strickland* requires close scrutiny. It is critical to the reliability of a capital sentencing proceeding that the jury render an individualized decision. *Gregg v. Georgia,* 428 U.S. 153, 206 (1976); *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976); *Lockett v. Ohio,* 438 U.S. 586, 605 (1978); *Armstrong v. Dugger,* 833 F.2d 1430, 1433 (11th Cir. 1987). Thus, the jury's attention should be focused on the "particularized nature of the crime and the particularized characteristics of the individual defendant." *Gregg,* 428 U.S. at 206. In this case, the sentencing jury knew much about the crime, having just convicted Harris of a brutal murder, but little about the characteristics of the defendant. They did not know that family members would contend that Harris was a devoted father, husband and brother. They did not know that these relatives and a minister would describe Harris as a decent loving man whose life was important to them. To the contrary, appellant's lawyer erroneously told the jury that Harris' family had "turned against him." Thus, the jury did not assess "the information needed to properly focus on the particularized characteristics of this petitioner. *Armstrong,* 833 F.2d at 1433.

Evidence tending to show Harris' good character might well have been beneficial to the defense. Many death penalty cases involve planned murders,[9] but here the evidence fails to show that the appellant set out to kill Essie Daniels when he entered her home. Instead, the appellant appears to have embarked on a weaponless burglary during which he was surprised by the victim who produced the knife and apparently struck the first blow. The murder was brutal, but the absence of murder as a part of the initial design may have rendered the circumstances of this crime somewhat less egregious in the minds of the jurors. Thus, evidence seeking to show the appellant's character as being good may have had a greater impact on a jury deciding whether to impose the death penalty for this crime—a burglary gone horribly awry—as opposed to one involving murder as the intended goal from the inception of criminal conduct.

It does appear that injecting Harris' character as an issue during sentencing was fraught with danger. Although the prosecutor told the jury that Harris committed murder while on parole, the introduction of evidence about Harris' character would have allowed the state to further explore the appellant's other felony convictions as well as his dishonorable discharge from the Army. Nevertheless, on this record, we cannot conclude that effective counsel would have made a strategic decision to forego testimony about Harris' good character merely because its use would have permitted the state to add some prior unlawful acts to the proof already in the case. Indeed, one of Harris' lawyers conceded that he would have used the evidence had he known about it.[10] Testimony about the appellant's good character constituted the only means of showing that Harris

9 In *Strickland,* for example, the defendant planned and committed three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion and theft. 466 U.S. at 671-72.

was perhaps less reprehensible than the facts of the murder indicated. Because we find that a reasonable probability exists that a jury hearing this evidence would have recommended life, Harris suffered prejudice from counsel's errors.

We conclude that Harris' lawyers rendered ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments. The writ of habeas corpus must be granted insofar as the death penalty is concerned, subject to the holding of a new sentencing proceeding within a reasonable period of time to be set by the district court.[11]

III

For the foregoing reasons, the judgment of the district court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

10 There is no other conclusion available from this record than that Harris' character witnesses would have testified then, at the appellant's trial, as they do now.

11 In light of our holding, we need not reach appellant's contention that his trial lawyer's closing statement during the penalty phase constituted ineffective assistance of counsel. Also, we do not reach appellant's contention that the prosecutor's statements to the jury during sentencing violated the principles of *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-5612

THEODORE CHRISTOPHER HARRIS,
Petitioner-Appellant,

vs.

RICHARD DUGGER, Secretary, Department of Corrections,
State of Florida,
ROBERT BUTTERWORTH, Attorney General,
State of Florida,
Respondents-Appellees.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC
(Opinion May 16, 1989, 11 Cir., 198___, ___F.2d_____).
(August 17, 1989)

Before HILL, VANCE and ANDERSON, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:
/s/JAMES C. HILL
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-1220-CIV-PAINE

THEODORE CHRISTOPHER HARRIS,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State of Florida,
RICHARD DUGGER, Superintendent,
Florida State Prison at Starke, Florida and
ROBERT BUTTERWORTH, Attorney General,
State of Florida,

Respondents.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Before the court is a petition for Writ Habeas Corpus in which relief is requested pursuant to 28 U.S.C. § 2254. The petition initiating this action was filed in this court on Friday, July 1, 1988. The case was assigned to the undersigned District Judge.

In 1981, Petitioner was convicted of First Degree Murder, Burglary of a Dwelling with a Dangerous Weapon and with an Assault, and Robbery with a Dangerous Weapon. The jury recommended the death penalty for the stabbing murder of the 73 year old Essie Daniels. The trial judge sentenced Petitioner to death on the Murder count and 100 years, consecutively, on the two additional counts. Petitioner's conviction and sentence were upheld by Florida Supreme Court. *Harris v. State,* 438 So.2d 787 (Fla. 1983), *cert. denied* 466 U.S. 963 (1984). Petitioner sought a writ of

habeas corpus from the Florida Supreme Court based on ineffective assistance of appellate counsel which was denied. *Harris v. Wainwright,* 473 So.2d 1246 (Fla. 1985). Petitioner then sought post-conviction relief pursuant to Fla.R.Crim.P. 3.850. Petitioner raised twenty issues. After an evidentiary hearing, Petitioner's requested relief was denied. Petitioner appealed to the Florida Supreme Court. On appeal two major issues were addressed. The other eighteen were merely mentioned summarily. On July 1, 1988, The Florida Supreme Court affirmed the trial court's denial of post conviction relief pursuant to Fla. R.Crim.P. 3.850. *Harris v. State,* No. 72,589 (Fla. July 1, 1988). The same day Petitioner filed his application for writ of habeas corpus pursuant to 28 U.S.C. § 2254 and application for a stay of execution with this court. Petitioner's death warrant is returnable Friday, July 8, 1988 at 7:00 A.M.

A hearing was scheduled and orally noticed to counsel for the parties at 11:00 A.M. Tuesday, July 5, 1988. Counsel appeared presenting the positions of their clients to the court. Petitioner had filed a brief in support of the petition with the petition. Respondent filed written response at the hearing and, later in the day supplemented that response with an additional written submission.

A prerequisite to considering a federal habeas corpus petition is exhaustion of state remedies. 28 U.S.C. § 2254(b). Since this petition raises issues which were exhausted and issues which were not exhausted in the state proceeding, Petitioner's application for a writ of habeas corpus is a mixed petition. As such, the petition must be dismissed for failure to exhaust state issues in the state forum. *Rose v. Lundy,* 455 U.S. 509 (1982). However, the state has the prerogative and discretion to waive the exhaustion requirement. *Thompson v. Wainwright,* 714 F.2d 1495, 1501 (11th Cir. 1983). The State of Florida has waived the exhaustion requirement in this case. See Waiver of Exhaustion (De 27).

The Court, in its discretion, accepts the waiver of the exhaustion requirement by the State of Florida.

Therefore, the Court may address the merits of Petitioner's application for writ of habeas corpus. Petitioner has raised the following points:

A. that the conviction be vacated because the confession was obtained under circumstances that violated his constitutional rights;

B. that the failure to suppress the confession violated the Fifth Amendment;

C. that protracted interrogation before initial appearance in return of the warrant violated Petitioner's right to counsel;

D. exclusion of death-scrupled jurors;

E. improper comment on silence;

F. ineffective assistance of counsel due to failure to secure a defense serologist or orthopedist;

G. failure to charge the jury on lesser included offenses;

H. ineffective assistance of counsel by failure to request jury instructions on lesser included offenses;

I. ineffective assistance of counsel regarding the penalty phase;

J. ineffective assistance of counsel during summation at the penalty phase;

K. violation of due process and the Eighth Amendment by improper comment by prosecutor on the jury's role in the sentencing process;

L. violation of due process and the Eighth Amendment by improper argument by prosecutor in penalty phase;

M. trial judge's instruction on "heinous, atrocious, and cruel" aggravating factor;

N. violation of due process and the Eighth Amendment by improper instructions on aggravating circumstances;

O. violation of due process and the Eighth Amendment by failure to instruct the jury that it could recommend life even if no mitigating factors were found;

P. lack of independent judicial consideration of the propriety of the death sentence violated the Eighth and Fourteenth Amendments;

Q. violation of Fifth, Eighth and Fourteenth Amendments due to failure to conduct proportionality review;

R. ineffective assistance of counsel at appellate stage for failure to challenge adequately the arrest warrant;

S. unconstitutional presumption in favor of death for felony-murder convictions;

T. unconstitutionality of Florida's death penalty by arbitrary and inconsistent application;

U. trifurcated system of capital sentencing unconstitutionally disperses decision making authority; and

V. loss of Petitioner's life.

The points raised in two categories shall be discussed: the confession (Points A, B, C) and ineffective assistance of counsel (Points F, H, I, J, R).

* * *

Petitioner posits that he was not afforded effective representation in that:

a. Defense counsel failed to secure the services of a serologist to review and evaluate the work of witnesses called by

the state who offered evidence identifying blood specimens found by investigators.

b. Defense counsel failed to procure an orthopedic specialist to analyze pertinent medical records and to examine Harris' hand.

c. Defense counsel failed to request jury instructions on lesser included offenses.

d. Defense counsel failed to marshal and offer evidence in mitigation at the penalty phase of the trial.

e. Defense counsel made prejudicial, false and inflammatory statements in summation at the penalty phase in which he incorrectly stated that Petitioner's family had "turned against him" and by suggesting, without factual foundation, that Harris' conduct might have resulted from the use of drugs.

f. Defense counsel failed to adequately challenge the allegedly unlawful arrest warrant.

The controlling case on the issue of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). This precedent requires that, to set aside a death sentence, a defendant must demonstrate that counsel's work was deficient and that prejudice resulted so as to deprive defendant of a fair trial.

The submissions of counsel and the record of prior proceedings have been studied and considered. The constitutional guarantees asserted to have been violated have been examined together with interpretations by many case opinions of the Supreme Court of the United States and by the Fifth and Eleventh Circuits.

The constitutional right to a competent attorney does not insure that defense counsel will raise every conceivable position which a defendant may assert *Jacobson v. Wain-*

wright, 450 So.2d 200 (Fla. 1984); *cert. denied,* 469 U.S. 1062 (1984). Decisions of the trial attorney which may not be criticized in the light of subsequent occurrences, unless no competent attorney would have utilized such a decision. *McNeal v. Wainwright,* 722 F.2d 1443 (11th 1984); *Adams v. Wainwright,* 709 F.2d 1443 (11th 1983), *cert. denied,* 104 S.Ct. 745 (1984).

Under the circumstances of the trial of this case it is clear that the defendant did not suffer ineffective assistance of counsel during the trial phase. The charge of ineffectiveness of counsel is presented with greater force as to the penalty phase. However, even there, the alleged deficiencies of counsel in failing to present witnesses and documentary evidence in mitigation do not support the conclusion that constitutional rights were violated. An attorney's decision not to interview witnesses, but to rely on other sources of information, when made in the exercise of professional judgment, does not equal ineffective assistance. *United States v. Chancy,* 446 F.2d 571 (3rd 1971). While the two lawyers representing Harris seemed to have thought that the other was responsible for the preparation for the penalty hearing, it is clear that some efforts were made to produce witnesses. More, perhaps, could have been done. But there is no proof that such additional efforts would have produced a different result. Perfection in preparation and presentation is not required by the United States Constitution.

Argument by defense counsel at the penalty phase that the defendant was not guilty in the face of a jury verdict to the contrary does not constitute ineffective assistance. *Funchess v. Wainwright,* 772 F.2d 683 (11th 1985). Even harsh comments by defense lawyers during summation do not require reversal. *Darden v. Wainwright,* ___ U.S.___ 106 S.Ct. 2464 (1986). *Thompson v. Wainwright,* 787 F.2d 1447 (11th 1986).

The assertion that petitioner was deprived of constitutional rights by appellate counsel is found to be wholly without merit in the light of a review of the petitioner's record on appeal to the Florida Supreme Court.

The remaining issues raised (Points D, E, G, K, L, M, N, O, P, Q, S, T, U and V) have been reviewed and it is determined that they are without merit.

Accordingly, it is

ORDERED AND ADJUDGED that Petitioner's application for a Stay of Execution is GRANTED.

ORDERED AND ADJUDGED that Petitioner's application for a Writ of Habeas Corpus is DENIED.

ORDERED AND ADJUDGED that the issues presented are such that this Court certifies that there is probable cause for review by the Court of Appeals.

DONE AND ORDERED at West Palm Beach, Florida this 6th day of July, 1988.

/s/ James C. Paine
James C. Paine
United States District Judge

cc: Daniel L. Rabinowitz, Esq.
Charles M. Fahlbusch, Esq.
Assistant Attorney General

SUPREME COURT OF FLORIDA

No. 72,589

THEODORE C. HARRIS, Appellant,
vs.
STATE OF FLORIDA, Appellee.

[July 1, 1988]

OVERTON, J.

In this postconviction relief proceeding, Theodore C. Harris appeals the denial of his Florida Rule of Criminal Procedure 3.850 motion to vacate his conviction and sentence of death, and also seeks a stay of execution from his death warrant. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. For the reasons expressed below, we affirm the trial court's denial of the requested relief and deny the stay of execution.

This is Harris' first death warrant but his third appearance before this Court. We affirmed his conviction and sentence of death in *Harris v. State,* 438 So.2d 787 (Fla. 1983), *cert. denied,* 466 U.S. 963 (1984). As reflected in that decision:

> The victim, a seventy-three-year-old woman, was found dead in her home on the morning of Sunday, March 22, 1981. She had died during the night from multiple stab wounds and wounds inflicted by a blunt instrument. A knife, a bloody rock, and a blood-covered wooden chair were found in the house. The autopsy revealed that the victim had suffered numerous defensive wounds on her arms, hands, and shoulders. Blood was splattered over the walls and furnishings of the bedroom, living

> room, and kitchen, indicating that the victim had tried to escape her assailant while she was being stabbed and beaten.

Id. at 789. At the time of the murder, Harris was living with the victim's granddaughter in the same neighborhood. He had previously been married to that granddaughter's sister. Harris had signed a written confession which was fully set forth in our prior opinion. He presented no evidence in his own behalf in the guilt phase of the trial.

During the penalty phase, the state presented evidence that Harris had been previously convicted of robbery and that he was on parole at the time of the murder. At the conclusion of the penalty phase, defense counsel requested a continuance to bring Harris' ex-wife, other family members, and a minister from Jacksonville to testify in Harris' behalf. When the court reconvened, counsel advised the court the ex-wife was hospitalized and he had been unable to contact the minister. As a result of the unavailability of these witnesses, Harris presented no evidence in mitigation during the penalty phase. We affirmed the imposition of the death sentence and agreed that the following aggravating circumstances applied: (1) Harris was under a sentence of imprisonment when he committed the murder; (2) he had previously been convicted of a felony involving violence; (3) the murder was committed while Harris was engaged in committing a robbery or burglary; and (4) the murder was especially heinous, atrocious, and cruel. We rejected the aggravating circumstance that the murder was committed in a cold, calculated, and premeditated manner, but concluded that the improper finding of this aggravating circumstance did not require a new sentencing proceeding. *Id.* at 798.

Subsequently, Harris petitioned this Court for a writ of habeas corpus, claiming he was denied effective assistance

of counsel during his direct appeal on the grounds his attorneys "failed to adequately challenge the validity of the affidavit of probable cause that supported the warrant for his arrest." *Harris v. Wainwright*, 473 So.2d 1246, 1247 (Fla. 1985). We rejected that claim, noting that Harris was seeking a second review of an issue which was previously raised and expressly addressed by the Court. Further, we found that his counsel was not ineffective and that the allegations did not establish prejudicial appellate counsel deficiencies.

This 3.850 motion raises multiple issues, fifteen of which the trial court rejected because they were "either barred on the grounds of res judicata, collateral estoppel and the law of the case, having previously been ruled upon [by this Court, or that they were] procedurally barred because they were issues which could have and should have been raised on direct appeal but were not and which were not properly preserved by request or objection at trial." The trial court held an evidentiary hearing regarding the ineffective assistance of counsel claims and, in denying relief, concluded that "defense counsel did not commit any deficiency below the standards expected of counsel." In addressing the question of whether Harris was prejudiced because of the failure to present certain testimony, the court concluded that "the testimony of the witnesses heard during this hearing would not, in any way, shape or form, have altered the verdict that the original jury reached."

This appeal addresses principally the claim that trial counsel was ineffective in failing to properly investigate and obtain character evidence through Harris' service and school records and from members of his family and former employers. Harris also claims that his trial counsel was ineffective in the manner in which he argued the case before the jury.

These ineffective assistance of counsel claims are governed by the principles set forth by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In determining ineffectiveness of counsel, the issue is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 669, 104 S.Ct. at 2055. To reverse a conviction or set aside a death sentence on these grounds, the defendant must show "first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *Id.* Further, "[w]hen a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S.Ct. at 2068. The *Strickland* Court noted that, in answering the question, a court need not first determine whether counsel's performance was deficient before examining whether the claimed deficiency resulted in prejudice to the defendant. We previously explained how the *Strickland* test is to be applied in *Downs v. State,* 453 So.2d 1102 (Fla. 1984).

The claim of ineffectiveness presented in *Strickland* asserted that counsel was deficient in failing to investigate and present character witnesses and obtain a psychiatric report for the defendant. The evidence that was alleged should have been presented in *Strickland* would have shown that numerous people thought the defendant was generally a good person and that a psychiatrist and psychologist believed he was under considerable emotional stress. The United States Supreme Court rejected this claim, noting that the evidence would not have sufficiently altered the sentencing profile and, because of the aggravating factors,

there was no reasonable probability that the omitted evidence would have changed the conclusion.

The claim in Harris' case is similar. He asserts counsel was ineffective for failing to have presented certain mitigating evidence. He argues that, cumulatively, the testimony from relatives and friends which should have been presented would have established that Harris was a kind, decent man dedicated to his family, a warm and loving parent, a good provider, a timid person and not the kind who would ever harm anyone, a regular church-goer, a dependable and trustworthy employee, and a loyal and valued friend.

He also argues that his school and military records should have been presented to the jury to demonstrate, inter alia, that during his service in the army Harris was commended for assisting the Red Cross in blood drive on one day. He received a commendation letter thanking him and seven other servicemen for assisting the driver in setting up and breaking down the mobile blood unit.

To this evidence the state could respond that when Harris committed this murder, he was burglarizing the home of the grandmother of the woman who had befriended him and given him a place to stay. Further, that his military records show he was undesirably discharged and had been absent without leave on several occasions. Additionally, that evidence would allow the state to present evidence that Harris had been convicted of two prior burglaries and a robbery in which he broke an elderly woman's arm while snatching her purse. These circumstances, coupled with the statutory aggravating circumstances, including the fact that this seventy-three year-old woman had six stab wounds and forty-one incisions wounds caused by a knife and five lacerations caused by a blunt instrument, overwhelm the suggested mitigating evidence. We conclude there is no reasonable probability the omitted mitigating evidence would have

affected the jury's recommendation or the sentence imposed by the trial judge. *See, e.g., McCrae v. State,* 510 So.2d 874 (Fla. 1987); *Maxwell v. Wainwright,* 490 So.2d 927 (Fla.) *cert. denied,* 107 S.Ct. 474 (1986); *Porter v. State,* 478 So.2d 33 (Fla. 1985). We also reject as without merit the claim that his counsel's argument in the penalty phase was so ineffective that it requires a new sentencing proceeding.

Accordingly, we affirm the trial court's order and deny Harris' application for a stay of execution.

It is ordered.

McDONALD, and GRIMES, JJ., concur

EHRLICH, C.J., concurs specially with opinion SHAW, J., concurs specially with opinion with KOGAN, J., concurs KOGAN, J., dissents with opinion with which BARKETT J., concurs NO MOTION FOR REHEARING WILL BE CONSIDERED.

EHRLICH, C.J., specially concurring.

While I concur with the Court's opinion and with the special concurring opinion of Justice Shaw, I would like to express an additional thought or two.

It should be apparent from the reading of the opinions of this Court in death penalty cases that this Court expects the same high standards of professional competence in the preparation for and the conduct of the penalty phase of the trial, as it does in the guilt phase. This is not to say that counsel for a defendant may not exercise a reasonable judgment and decide not to put on any witnesses, or to put on a limited number of witnesses designed to "humanize" the defendant, or at least to show that there is sufficient good in the otherwise tainted character of the defendant that the death penalty would be inappropriate. But, it is elementary that reasoned judgment cannot be made and options exercised unless and until a complete investigation into the defendant's background and past have been made. I recognize also that counsel has to weigh the good against the bad and decide whether presenting the good side of defendant will outweigh the adverse evidence that may come in by way of cross examination or rebuttal, and that if he feels that under such circumstances it would adversely affect defendant to put on such positive evidence, that he should not do it.

It appears to me that in addition to a complete investigation into defendant's background and character, that it is also necessary to explore the defendant's mind to ascertain if there be present any evidence that would call into play a statutory mitigating factor, or any non-statutory mitigating circumstances.

Since so much time generally elapses between the original trial date and time of collateral proceedings raising the inevitable charge of ineffective assistance of trial counsel, I

think that counsel would be well advised to save his or her file so that when called upon the testify in response to the charge of ineffective assistance, that counsel will not have to depend solely on a memory possibly dulled by the passing of time.

SHAW, J., specially concurring.

Although I agree that relief should be denied because appellant has not shown prejudice resulting from the alleged ineffectiveness of counsel, I believe something should be said about counsel's performance. From the testimony of the two defense attorneys at the evidentiary hearing below, it is obvious that both believed that the other was contacting witnesses in preparation for the penalty phase and, consequently, neither was prepared when the penalty phase arrived. Because of this, a continuance was obtained and efforts made to contact witnesses. This lack of attention and preparation reflects inadequate assistance of counsel even if it did not result in constitutional ineffectiveness under the *Strickland v. Washington*, 466 U.S. 668 (1984), prejudice prong.

EHRLICH, C.J., concurs

BARKETT, J., dissenting.

I respectfully but emphatically dissent. In my view, this case presents a glaring example of prejudicial ineffectiveness. Contrary to what the majority opinion suggests, Harris presented no evidence during the penalty phase not because of the unavailability of witnesses but because his two lawyers, prior to the day the penalty phase began, had not devoted a single hour of their time to preparing for that phase of the trial. And, as the testimony at the evidentiary hearing below made clear, defense counsels' complete and utter failure to investigate, prepare, or present mitigating evidence during the penalty phase was not the result of a reasoned strategic decision but was due to the fact *each believed the other was preparing the penalty phase of the trial.* The testimony at the hearing below was unequivocal on this point: Both attorneys testified that they erred, that their conduct was below acceptable norms, and that they would have presented the mitigating evidence now brought to light had they known of its existence.

It cannot be denied that such conduct falls far short of *Strickland's* requirement of reasonably adequate assistance. As the Supreme Court noted in *Strickland,* "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgements." *Id.* In this case, because each counsel believed the other was responsible for the penalty phase, there was no decision not to investigate. Counsels' failure most clearly was not the result of reasoned professional judgement, and, in my view, "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687. *See also Blake v. Kemp,* 758 F.2d 523, 533 (11th Cir.

1985) ("It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness"), *cert. denied,* 474 U.S. 998 (1985). Courts have found deficient performance based upon errors less far-reaching than counsel's error in this case. *See Tyler v. Kemp,* 755 F.2d 741 (11th Cir. 1985); *Armstrong v. Dugger,* 833 F.2d 1430 (11th Cir. 1987); *King v. Strickland,* 748 F.2d 1462 (11th Cir. 1984), *cert. denied,* 471 U.S. 1016 (1985).

Turning to the second prong of the *Strickland* test, I cannot agree that Harris was not prejudiced by his counsels' deficient performance. My reasons are threefold: first, without hearing any evidence in mitigation whatsoever during the penalty phase, four of the twelve jurors voted for life imprisonment.

Second, the circumstances of the murder in this case differ markedly from those in *Strickland.* In *Strickland,* the defendant planned and committed a series of crimes, which included three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft. 466 U.S. at 671-72. Furthermore, the defendant in *Strickland* confessed and pleaded guilty to all charges, then waived his right both to a jury trial and a penalty phase advisory jury. *Id.*

In contrast, the murder here was not planned but resulted from a burglary gone awry. The evidence indicates that Harris entered the victim's house believing it to be unoccupied and was surprised by the victim. In the ensuing struggle, the victim was killed and Harris himself injured. Under such circumstances, I believe there is a reasonable probability that character testimony might have affected the outcome.

Third, I do not agree that because the state may have sought to introduce evidence of prior bad acts by Harris, Harris was not prejudiced by the absence of the character evidence. Harris stood convicted of the stabbing murder of any elderly woman. The jury already knew he was on parole at the time.

Thus, the jury was aware of much that was damaging to Harris. The testimony of his family and friends, however, would have presented another side to Mr. Harris' character, demonstrating that he was not totally reprehensible and, even in prison, his life could serve some useful purpose. Rehabilitative potential unquestionably is valid mitigating evidence. *Skipper v. South Carolina,* 476 U.S. 1 (1986); *McCampbell v. State,* 421 So.2d 1072, 1075-76 (Fla. 1982). Regardless of how any particular individual might weigh this testimony, it clearly is the type of mitigating evidence that might persuade a jury that death is not the appropriate penalty. Juries have recommended life sentences under similar circumstances. *See, e.g., Holsworth v. State,* 522 So.2d 348 (Fla. 1988).

I also believe that this case involves more than a mere weighing by this Court of the aggravating and mitigating circumstances. As the Court admonished in *Strickland,* "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." 466 U.S. at 696. Because his lawyers abdicated their responsibility to investigate or prepare mitigating evidence, Harris received virtually no defense at all in the penalty phase of his trial. Although counsel presented a closing argument at the penalty phase, counsel may well have done Harris more harm than good by arguing, falsely, to the jury that Harris' family had turned against him, since jurors may have interpreted this to mean he was irredeemable.

A death sentence imposed where counsel's representation amounts to practically no representation at all does not comport with the eighth amendment's requirement of reliability in capital sentencing. As the Supreme Court relentlessly has emphasized in its capital decisions, one of the key aspects of the penalty phase proceeding is that the sentence be individualized. *Gregg v. Georgia,* 428 U.S. 153, 206 (1976); *Lockett v. Ohio,* 438 U.S. 586, 605 (1978). As the Court noted in *Woodson v. North Carolina,* 428 U.S. 280, 298 (1976) (quoting *Furman v. Georgia,* 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting)), "individual culpability is not always measured by the category of the crime committed." For this reason, the death penalty may not be imposed without some "particularized consideration of relevant aspects of the character and record of each convicted defendant." 428 U.S. at 303 (plurality opinion). In this case, counsel failed to provide the jury with the information it needed to focus properly on the individualized characteristics of this appellant. *See Armstrong,* 833 F.2d at 1433.

Accordingly, I conclude that confidence in the outcome has been undermined, and I would vacate the death sentence and grant appellant a new sentencing proceedings.

KOGAN, J., concurs

KOGAN, J., dissenting.

I concur with Justice Barkett's dissenting opinion. I would further point out that during his closing argument to the jury, appellant's trial counsel stated the following:

> I am nor going to tell you — to stand here and talk to you about proof, what's been reasonable doubt, *but I ask you to consider that Theodore Harris sits there and he's the only person that stands behind him when you think about the fact that his family has turned against him because of this act. He's always — and they have been against him since then.* Mr. Darby [Assistant State Attorney] asked — who comes in here to speak for him? Think about that. They don't want to be against him. They don't want to be for him.

This assertion, as the testimony of the witnesses at the 3.850 hearing demonstrated, was incorrect. Appellant's family and friends were not present at trial to testify on his behalf because counsel failed to properly prepare for the penalty phase portion of the trial.

Not only was appellant deprived of his right to present friendly witnesses on his behalf, but his own counsel inferred that the act for which appellant was convicted was so offensive that his family turned against him and would not appear in court to testify. There can be no question that counsel's statement severely damaged any chance appellant had for a recommendation of life imprisonment. This ineffective assistance of counsel was highly prejudicial to appellant.

I would vacate the sentence of death and remand this matter for a new sentencing proceeding before a new jury.

BARKETT, J., concurs

An appeal from the Circuit Court in and for Dade County Ellen J. Morphonios, Judge - Case No. 81-7561.

Daniel J. Rabinowitz and Keith E. Lynott of McCarter & English, Boca Raton, Florida and Newark, New Jersey, for Appellant.

Robert A. Butterworth, Attorney General, Charles M. Fahlbusch, Assistant Attorney General, and Richard L. Kaplan, Capital Collateral Coordinator, Miami, Florida, for Appellee.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 81-7561

THE STATE OF FLORIDA,

Plaintiff,

vs.

THEODORE CHRISTOPHER HARRIS,

Defendant.

ORDER DENYING MOTION FOR POST-CONVICTION RELIEF

THIS CAUSE having come before this Court upon the motion of the defendant, THEODORE CHRISTOPHER HARRIS, for Post Conviction Relief, on June 6, 1988 at approximately 3:00 p.m., and continuing through June 7, 1988, and the court having reviewed the Record and Transcripts, having heard the testimony of witnesses, having reviewed the pleadings and being, otherwise, fully advised in the premises, it is hereby ORDERED AND ADJUDGED, as follows:

1. With regard to the allegations of ineffective assistance of counsel during the penalty phase of the trial for failure to discover and present mitigating evidence during the penalty phase of the trial (Issue (A.a) and for an ineffective penalty phase summation (Issue A.b.), this Court finds that the defense trial counsel did not commit any deficiency below the standards expected of counsel.

Further, the testimony of the witnesses heard during this hearing would not, in any way, shape or form, have altered the verdict that the original jury reached.

Therefore, even if some act or omission of trial counsel could be considered to have been deficient, such deficiency could not have prejudiced the defendant.

2. With regard to the allegations of ineffective assistance of trial counsel during the guilt phase for counselling the defendant to waive his right to jury instructions on lesser - included offenses (Issue C.g.) and for failure to procure the services of experts (Issue C.h.), no evidence was presented that these acts constituted ineffectiveness of counsel and, in fact, the only evidence presented on the issue was that trial counsel was effective during the guilt phase of the trial. This Court finds that trial counsel was effective during the guilt phase of the trial.

3. Further, this Court finds, with regard to each of defendant's allegations of ineffective assistance of counsel, that defendant has not demonstrated that he was prejudiced thereby, as required by *Strickland v. Washington*, 466 U.S. 668 (1984).

4. No evidence was presented that the defendant was prejudiced in any manner by the alleged loss of the Public Defender's file and this motion is denied on that ground, as well. (Issue D).

5. Five (5) of the remaining fifteen (15) issues of the motion are barred on the grounds of res judicata, collateral estoppel and law of the case, having been previously ruled upon, against the defendant, by the Florida Supreme Court. Specifically, Issues A.c., C.a., C.b., C.d. and C.F. of the Motion.

6. The remaining ten (10) issues of the motion are procedurally barred because they were issues which could have and should have been raised on direct appeal, but were not and which were not properly preserved by request or objection at trial. Specifically, Issues A.d., A.e., A.f., A.g., A.h., B.a., B.b., B.c., C.c. and C.e. of the Motion.

DONE AND ORDERED at Miami, Dade County, Florida this 13 day of June , 1988.

/s/ Ellen J. Morphonios
JUDGE OF THE CIRCUIT COURT

cc: Daniel Rabinowitz
David Gilbert
Charles M. Fahlbusch

IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO. 81-7561 (Morphonios)

THE STATE OF FLORIDA,

Plaintiff,

vs.

THEODORE CHRISTOPHER HARRIS,

Defendant.

The above-entitled cause came on for hearing before the Honorable ELLEN J. MORPHONIOS, Judge of the above-styled court, at the Metropolitan Justice Building, 1351 N. W. 12th Street, Miami, Florida, on June 7, 1988, pursuant to notice.

APPEARANCES:

Office of the State Attorney
1351 N. W. 12th Street, Room 600
Miami, Florida 33125
BY: DAVID GILBERT
Assistant State Attorney on behalf of the State of Florida.

Office of the Attorney General
401 N. W. 2nd Avenue, Room N921
Miami, Florida 33128
BY: CHARLES M. FAHLBUSCH
and JONI BRAUNSTEIN
Assistant Attorney Generals on behalf of the State of Florida.

McCARTER & ENGLISH
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
BY: DANIEL L. RABINOWITZ, ESQ. on behalf of the Defendant.

* * *

Q. [David Gilbert, Prosecutor] If I understand you correctly, Mr. Fuller, you are telling this Court and would have been prepared to tell the jury in 1981 that you have no problems seeing Theodore Harris as a role model for your child?

MR. RABINOWITZ: Objection, Your Honor. That's a completely unfair characterization of what Mr. Fuller had to say.

THE COURT: Overruled. He said all the children looked up to him.

MR. RABINOWITZ: Your Honor, despite his inability to conform his conduct to the dictates of the law.

THE COURT: Ruling stands.

Q. You have no problem seeing Theodore Harris as a role model for your children; is that your testimony?

A. [Henry Fuller]: That's correct.

Q. Now, the man that you have chosen to be a role model for your children, do you know about his prior criminal record?

A. Yes, I do.

Q. You are aware that he was convicted of burglary prior to the time that he was convicted of this murder?

A. Yes.

Q. You are aware, then, that he was given probation on that burglary and violated it by committing another felony offense?

A. Yes.

Q. Before he committed this murder?

A. Yes.

Q. And you are further aware, then, that after committing those two felonies he then committed a robbery prior to this murder, making it a third felony that he has committed?

A. I did not know he had committed a robbery. If I had known that, maybe I would have known if I had been contacted through the court system here.

* * *

Q. [David Gilbert, prosecutor] Now, it is also your opinion, is it not, that Mr. Harris would never hurt anybody?

A. [Henry Fuller]: That's my opinion.

Q. And you registered this opinion despite the fact that he's committed two crimes of violence against another human beings?

A. Was it bodily harm?

Q. Do you know what the crime of robbery is?

A. Robbery, you could be snatching a pocketbook or something like that. It doesn't have to be violent. You mean physical?

Q. Under the law of Florida, a robbery requires either force, violence, putting someone in fear or assaulting them.

A. So does love, but explain yourself more thoroughly.

Q. So does love?

A. When people make love, sometimes they make it violently or romantically or passionately. Explain it deeper. I don't understand what you're talking about.

Q. I think we'll leave that area alone.

Now, you said that Theodore Harris is not a bad man?

A. No, I don't feel like he is.

Q. He stands convicted of a burglary, correct?

A. That's correct.

Q. He stands convicted of drug possession, correct?

A. I don't know about the drugs.

Q. A second felony which violated his probation?

A. Uh-huh.

Q. He stands convicted of robbing an elderly woman back in 1977 in Jacksonville?

A. Uh-huh.

Q. Do you know the facts of this murder? Do you know what was done to the victim in this case?

A. No. It was never presented to us in Jacksonville. If we had known that, maybe we would have known when to come to court.

Q. Did you know that the woman that was killed by Theodore Harris was a 73-year-old woman who was cut with a knife 50 times?

A. No, I didn't know that.

Q. Did you know that the woman that Theodore Harris killed was stabbed in the head five times?

A. No, I did not know that.

* * *

Q. [Daniel L. Rabinowitz]: How old were you in 1981?

A. [LaShawn Fuller]: I was 15.

Q. And were you close to Mr. Harris at that time as well?

A.. Yes, I was.

Q. Did anyone ever contact you—

A. No.

Q. —in 1981—

A. No.

Q. —about the possibility of testifying at Mr. Harris' trial?

A. No.

Q. Were you ever asked to come to Miami to testify about Mr. Harris' character?

A. No, I wasn't.

Q. Did you know back then that you could have come to Miami to testify about Mr. Harris' character and about your relationship to Mr. Harris in connection with the penalty phase of his trial?

A. No, I didn't.

Q. Did you know exactly when his trial took place?

A. No, I didn't.

Q. Did your parents know?

A. No, they didn't, also.

Q. Did anyone ever come to your house—

A. No.

Q. —or call your parents or call you on the telephone—

A. No.

Q. —about that?

Had you been asked to testify on Mr. Harris' behalf in 1981, would you have wanted to do so?

A. Yes.

Q. What would you have said to the Court, if you had been given the opportunity back then to testify?

A. I would have said he was a good uncle and he was a family man and he just was a good advisor for me during my career.

* * *

Q. [Daniel L. Rabinowitz]: How do you feel about Mr. Harris?

A. [Wayne Carswell] He's an excellent fellow. You know, I think about him, and he's the type fellow that I would trust, even with my family. If I had to go on a trip or something in the ministry, I would trust him to take care of my family while I'm gone.

Q. And yet you know of his long criminal record?

A. Yes, but I know him.

* * *

Q. [David Gilbert]: So back in 1981, at the time that you would have testified in this hearing had you been called, you had no knowledge that your dear and close friend had four prior contacts with the law before you employed him?

MR. RABINOWITZ: I'm going to object to the form of the question. The witness testified that he hired him when he was paroled from State Prison at that time.

THE COURT: Overruled.

Q. And at that time he had four convictions. You were unaware he had four criminal offenses on his record when you employed your good friend in 1981?

A. [Wayne Carswell]: I knew he had brushes with the law. Okay?

Q. Brushes?

A. Problems.

Q. Is that how you characterize a conviction for burglary of an automobile, a brush with the law?

A. Well, violation of the law if that's the word you're looking for, it was a violation of the law.

Q. It's a felony.

A. Well, I don't know about felonies or anything.

Q. After he was found guilty and put on probation for that burglary, did you offer him support and counseling as a friend?

A. Sure. I've always talked with him, yes.

Q. To try to get him back on the straight and narrow?

A. Sure, we've always talked.

Q. But he let you down while on probation by being caught for another felony while on probation, didn't he, or you didn't know about that?

A. I did not know.

Q. I see.

So after he let you down and was found guilty of a drug possession charge while on probation, do you know if you again supported him and tried to give him counseling as a friend to get him back on the straight and narrow?

A. Well, like I said, even if Theodore today needed a place to stay, he could stay with me.

Q. My question to you, sir, is after he was violated on probation and spent time in the County jail for violating his probation with another felony, did you again try to counsel him and keep him on the straight and narrow, sir?

A. Here, you mean—

Q. No, in Jacksonville.

A. In Jacksonville. Anytime I saw him, we would always talk, yes, anytime.

Q. And are you aware that after getting out of the County jail on the second felony he committed an assault and was convicted of a criminal assault and battery on another human being after that?

A. No.

Q. Are you aware that after that assault and battery he was again convicted of a felony of a robbery, which requires an assault, violence or threat against a human being while taking their property?

A. No.

Q. You were not aware—

A. No.

Q. —he had made two violent assaults on people?

A. No.

Q. And this murder would then become the third violent assault?

A. I didn't know about that.

Q. Well, okay. Do you know the facts of the murder? Do you know what he did?

A. No.

Q. No one's ever told you?

A. No.

Q. You said he had a great deal of respect for the church; is that correct?

A. Growing up he did, uh-huh.

Q. Can you explain, therefore, why he stole $30 of church money from a church bake sale?

A. No.

Q. Is there anything in his background that would explain that conduct as you know him?

A. No. The only thing, maybe if he got with the wrong group or something.

Q. So if this was done as a group crime, that might explain it, but if he acted on his own you have no explanation?

A. Like I said, if he had gotten around the wrong group and influenced by them.

Q. Do you know of anything in his background that would explain why he would inflict fifty knife wounds in order to take $30 from a member of the church?

A. No.

Q. Do you know of any reason in his background why he would stab a 73-year-old woman five times in the head to get $30 from her?

A. No.

Q. You still think he's somebody you trust your family with?

A. If I had to leave town today for the ministry and he was the only person in Jacksonville or if he was near, I would say, "Theodore, will you stay and watch my family while I'm away?" I still trust him.

Q. You still trust him.

A. I still trust him.

Q. Isn't there a darker side to Theodore Harris that you refuse to acknowledge?

A. I don't know of one.

Q. You don't consider a conviction for assault and battery, a conviction for robbery of an elderly woman and the conviction for murder and robbery of another elderly woman to be a dark side of a human being?

A. Well, you're just telling me these things and you're saying to me is there other things I want to disclose here today. I don't know of any other things.

Q. Assuming that the facts that I'm telling you are correct, is that not a dark side of a human being?

A. I can't disclose it. You've just shared that with me.

THE COURT: Did you know the lady killed was his wife's grandmother?

THE WITNESS: No.

* * *

THE COURT: All right. With regard to Case Number 81-7561 the Court is completely familiar with Mr. Al Williams as a trial attorney. I'm not that familiar with Pedro Echarte. I know who he is, but if I've had him practicing before me I frankly don't remember it, which means nothing against him, but I am thoroughly familiar with Mr. Al Williams. He's a very thorough attorney. He has been ever since I've known him. He's a good attorney.

I share with Mr. White the statement that I don't believe Mr. Williams would ever come in here and say something that was inaccurate, not true, hedged or shaded; however you might want to use the phrase. I think that the investigator that was working with Mr. Echarte and Mr. Williams, just as Mr. Williams testified, was diligently trying to locate members of Mr. Harris' family, not members of Mrs. Harris' family, but members of Mr. Harris' family.

I think that a number of the people whose names have been mentioned were made known to Mr. Williams, Mr. Carswell, Mrs. Harris, and frankly I think there was another one whose name escapes me at the moment.

Be that as it may, I think that Mr. Williams, as he stated, regardless of between Pedro Echarte and Mr. Williams as to who thought they were the supreme being in the making of decisions, Mr. Williams very accurately said, "No matter which one of us is making the decision, I am the senior Public Defender, I am responsible for anything Mr. Echarte does and I am responsible for anything the Public Defender investigator does."

I think that Mr. Williams had intended to put on witnesses, if they were available, with regard to Mr. Harris' background. They were not available. Some of them didn't show up that he knew about.

Mrs. Harris, who according to Al Williams was a little wishy-washy with the investigator as to whether she would or would not testify for Mr. Harris, solved the matter simply by being in the hospital and unable to testify for anybody about anything and avoided the entire issue. I'm not saying she did that deliberately, but it conveniently got her out of a pickle.

I think Mr. Williams made a tactical decision forced upon him by the fact that the people from Jacksonville never showed up and he made a decision to rely on hopefully hitting the sympathy on behalf of the jury by pointing out that Mr. Harris had a deprived background type and that he did not have his family with him and was seeking the sympathy of the jury and hoping that the jury would decide that he's a poor put-upon human being and was, therefore, forced into these acts by reason of his background.

I think Mr. Williams was fully, completely, 1,000 percent aware that if he put on character witnesses, that Mr. Harris' less than admirable background was going to be jammed down the throats of the jury, which would have been not helpful to Mr. Harris in a penalty phase.

What I'm doing obviously is thinking out loud and the final question will be what have I missed that you want me to comment upon?

With regard to the witnesses that the Court heard today, I cannot by any stretch of the imagination believe that the jury would have been influenced by their testimony to reach any conclusion other than the one that they reached in their verdict.

I share with Mr. Gilbert the feeling—I'm trying to say incredibleness, which is of course not a word—lack of believability or acceptance of statements by some of the witnesses as to what a good fellow Mr. Harris was, as to what a fine

person he was, what a role model he was when he had the background that he did, which seemed to come as a surprise to some of the witnesses.

They knew he had brushes with the law, but when the exact extent of those brushes with the law was brought to their attention, although they stayed strong and continued to say, "Oh, yes, he's a good fellow and I love him and I'll stand by him," that they were a bit shocked with what they heard today.

I don't think the testimony of any of the witnesses heard here today would have altered in any way, shape of form the verdict that the jury reached in 1981.

With regard to this case, 81-7561, the motion is denied.

If there is anything that you gentlemen, either one of you or all of you, wish me to comment upon so that whoever reviews this has the benefit of whatever thinking I might have, I'll be happy to do that.

* * *

No. 89-650

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD DUGGER, Secretary, Department of Corrections, State of Florida,

ROBERT BUTTERWORTH, Attorney General, State of Florida,

Petitioner,

—v.—

THEODORE CHRISTOPHER HARRIS,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a unanimous panel of the Court of Appeals for the 11th Circuit correctly held that an incarcerated indigent defendant charged in Miami with a capital offense and represented by the public defender received ineffective assistance of counsel when (a) pretrial discovery suggested that a conviction was likely but that jury argument in mitigation based upon the circumstances of the offense might well be available; (b) the accused had deep family roots in Jacksonville, and family, friends, clergy and a former employer were willing and able to testify at a penalty hearing; and (c) neither of his appointed attorneys performed any investigation whatsoever in preparation for the sentencing phase, neither presented any evidence on his behalf (despite the availability of witnesses) and one attorney in penalty summation falsely and erroneously told the jury that the reason no such testimony was presented was that the accused's family had turned against him because of the crime.

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Statement of the Case

Procedural History

Theodore Harris, an incarcerated indigent, then represented by the Public Defender of Dade County, was convicted after trial in the Florida 11th Judicial Circuit (for and in Dade County, Florida) of the murder of Essie Daniels, in Opa-Locka, Florida. The killing took place during the course of a burglary of the Daniels' home. Mr. Harris' confession was received in evidence; Mr. Harris did not testify at trial. *Harris v. Dugger*, 874 F.2d 756, 759, *reh'g denied*, 885 F.2d 877 (11th Cir. 1989). At the sentencing phase Mr. Harris' appointed attorneys pre-

sented no evidence whatsoever, and told the jury that Mr. Harris' family had turned against him as a result of his crime. The jury nevertheless divided, and rendered an advisory recommendation that Mr. Harris be sentenced to death by a vote of 8 to 4. *Id.* The trial court sentenced him to death.

The Florida Supreme Court, on direct appeal pursuant to Article V, 3(b)(1) of the Florida Constitution, Fla. Const. art. V, § 3(b)(1), affirmed the Judgment of conviction and sentence of death. *Harris v. State*, 438 So.2d 787, 798 (Fla. 1983), *cert. denied*, 466 U.S. 963 (1984).

In February, 1985, Mr. Harris filed in the Supreme Court of Florida a petition for Writ of Habeas Corpus and for Other Relief. *Harris v. Wainwright*, 473 So.2d 1246 (Fla. 1985). Relief was denied. *Id.* at 1247. Rehearing was denied.

Mr. Harris then filed a motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850, West's F.S.A. RCrP rule 3.850 (1973), in the trial court in November 1985. (Pet. App. A.40-41). A limited evidentiary hearing was granted and held before the trial court on June 6–7, 1988, to explore the question of whether Mr. Harris was afforded ineffective assistance of counsel during the sentencing phase of his trial. (Pet. App. A.40, 43-55). Judge Thomas Scott, the original trial and sentencing judge, had by that time left the state bench. Judge Ellen Morphonios presided at the Rule 3.850 hearing in his stead. The State presented no evidence at the hearing. Mr. Harris presented the testimony of:

1. Pedro Echarte, Esq.—Mr. Harris' trial counsel. (R.A. 7-10)
2. Alfred Williams, Esq.—Mr. Harris' lead trial counsel. (R.A. 4-6)
3. Henry Fuller—Mr. Harris' brother-in-law. (R.A. 23-27)
4. Janice Fuller—Mr. Harris' sister. (R.A. 32-36)
5. LaShawn Fuller—Mr. Harris' niece. (R.A. 19-22)

6. Christine Harris—Mr. Harris' ex-wife. (R.A. 37-42)

7. Wayne Carswell—Mr. Harris' minister and longtime friend. (R.A. 28-31)

8. William White, Esq.—an expert qualified by the trial court to present expert testimony on the issue of whether Messrs. Williams and Echarte provided ineffective assistance of counsel. (R.A. 11-18)

Mr. Harris' two attorneys testified under sequestration. Each averred that the other had been responsible for the preparation and conduct of the penalty phase; each stated that had he known of the existence of the Jacksonville witnesses he would surely have presented their testimony. None of the lay witnesses testified at Mr. Harris' original sentencing trial; all testified they would have testified at that trial if they had been asked to do so. Each testified without contradiction that he (or she) was never contacted by defense counsel. Each testified, in his or her own way, that he or she loved Mr. Harris and found value in his life, even while incarcerated. The trial court denied Mr. Harris' Rule 3.850 motion.

Mr. Harris appealed the denial of his Rule 3.850 motion to the Supreme Court of Florida. *Harris v. State*, 528 So.2d 361, 363 (Fla. 1988). On July 1, 1988, the Florida Supreme Court, in a 3-2-2 Opinion, denied the application for a stay and affirmed the trial court's denial of the Rule 3.850 motion. *Id.* Although five Justices of the Supreme Court of Florida found counsels' performance to have been fundamentally lacking, the Court divided on whether Mr. Harris was prejudiced under the tests enumerated in *Strickland v. Washington*, 466 U.S. 668 (1984).

Mr. Harris filed a Petition for Writ of Habeas Corpus and an Application for a Stay of Execution in the United States District Court for the Southern District of Florida on July 1, 1988. (Pet. App. A.24). On July 6, 1988, after hearing oral argument but without benefit of an evidentiary hearing, the Honorable James C. Paine denied the Petition for Writ of Habeas Corpus. *Id.* Judge Paine nevertheless ordered a Stay of Execution and

granted a Certificate of Probable Cause to Appeal. *Id.* A Notice of Appeal was timely filed on July 6, 1988.

Mr. Harris then appealed to the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals affirmed the District Court in all respects but one: it reversed and vacated Mr. Harris' death sentence directing that the writ of habeas corpus be granted unless Mr. Harris received a new sentencing hearing in the State Courts. *Harris v. Dugger*, 874 F.2d at 764.

Proofs at Trial

At trial, the State contended and proved that Mr. Harris, unarmed, entered Mrs. Daniels' home in Opa-Locka, Florida with the intention of stealing money. The proofs demonstrated that Mr. Harris entered the dwelling believing it to be unoccupied. The victim surprised the burglar, and attacked him with a kitchen knife from her own kitchen. During the ensuing fracas, Mr. Harris suffered a wound to his right hand severe enough to require surgery; Mrs. Daniels was killed with the same knife, stabbed multiple times, and bludgeoned. *Harris v. State*, 438 So.2d at 789-90. Upon his arrest, Mr. Harris confessed to the killing. The confession was introduced into evidence at trial.

The Abdication of Defense Counsel in the Penalty Phase

Mr. Harris, an indigent, was a native of Jacksonville, Florida. His family and friends still reside there. During the months that preceded his trial, he was at all times incarcerated in Dade County. The outrageous failure of Mr. Harris' Miami attorneys to prepare for his sentencing is carefully detailed in the record. Neither of Mr. Harris' two appointed trial counsel, Alfred Williams and Pedro Echarte, did a single hour's meaningful preparation. Each of Mr. Harris' lawyers testified (during the evidentiary hearing on the Rule 3.850 motion) that he thought the other was preparing the penalty phase. Each concedes that he himself did not prepare. With Mr. Harris' life hanging in the balance, Mr. Williams played Alphonse to Mr. Echarte's Gaston.

Although the presentation of mitigating evidence was essential, since a conviction was virtually certain if Mr. Harris' confession was introduced into evidence, the record is undisputed that Mr. Harris' appointed trial counsel failed to investigate Mr. Harris' background, failed to obtain his service and school records, and failed to locate and contact readily available members of Mr. Harris' family, friends and former employers. Had they been contacted, trial counsel could have presented to the trial jury and the trial court evidence that Mr. Harris' life had value to his friends, family and community. Among other testimony, such witnesses would have established that Mr. Harris was a loving and devoted father, a member of a strong family loyal to him, and despite his flaws of character, prior criminal record and conviction for murder, a friend valued by worthy and upright members of his community. As it was, the defense not only failed to present any witnesses at the penalty phase but made matters worse by stating, falsely, that Mr. Harris' family had turned against him as a result of this crime. Despite this amazing and disgraceful abdication by the defense, the jury nevertheless divided 8-4 on its recommendation of death.

Mitigating Evidence Trial Counsel Failed to Present

The evidence presented at the Rule 3.850 hearing demonstrated beyond legitimate dispute that trial counsel could have presented considerable favorable evidence about Mr. Harris' background and character.

Mr. Harris, a native of Jacksonville where the bulk of his family continues to reside, was the product of a close-knit and stable family environment. Although divorced at the time of the trial, Mr. Harris and his ex-wife Christine Harris had been attempting for several months prior to his April, 1981 arrest to reconcile their differences and resume their marriage. Mr. Harris is the father of three children. One child, Theodore, Jr. (who attended the Rule 3.850 hearing), was his own; the other two children were not Mr. Harris' natural children. Several witnesses at the hearing testified, based upon their frequent personal observations, that he always treated the other children as if they were his own. He was well known by all the potential

witnesses. While the precise statutory citations for Mr. Harris' past offenses eluded them, these people knew that Mr. Harris was frequently in serious trouble with the law, and testified that they understood he had been convicted of murder. Nevertheless, each testified that he or she loved Mr. Harris, and that his life had value to them.

There is no evidentiary dispute that trial counsel was ignorant of this information and consequently did not present it to the sentencing judge or jury. The sequestered testimony of Mr. Echarte and Mr. Williams at the Rule 3.850 hearing established as an uncontroverted (but nonetheless astounding) fact that both Mr. Williams and Mr. Echarte focused their efforts only on the guilt phase of the trial.

> Q. [by Mr. Rabinowitz]: Now, Mr. Williams, who was responsible for the preparation of the penalty phase of this case as between yourself and Mr. Echarte?
>
> A. [by Mr. Williams]: Mr. Echarte.

(R.A. 5). Compare this to the testimony of co-counsel:

> Q. [by Mr. Rabinowitz]: Mr. Harris [sic], between you and Mr. Williams, which of you was responsible for the preparation of the penalty phase in this trial?
>
> A. [by Mr. Echarte]: Mr. Williams.

(R.A. 8).

Mr. Harris' trial counsel not only failed to put in any of the available favorable evidence concerning Mr. Harris' character and background, but they made matters even worse for Mr. Harris by arguing to the jury in summation that Mr. Harris' family had turned against him, a statement that was not only wholly outside the trial record, but was demonstrably and disastrously false:

> *But I ask you to consider that Theodore Harris sits there and he's the only person that stands behind him when you think about the fact that his family has turned against him because of this act. He's always—and they have been*

> *against him since then.* Mr. Darby [Assistant State Attorney] asked—who comes in here to speak for him? Think about that. They don't want to be against him. They don't want to be for him.

(R.A. 1) (Emphasis supplied.)

This assertion, as the testimony of the witnesses at the Rule 3.850 hearing amply demonstrated, was simply untrue. Mr. Harris' family was ready and willing—indeed anxious—to assist Mr. Harris' cause, as the record shows.

The Expert's View

No more persuasive evidence of ineffectiveness exists in the trial court record than the unrebutted expert testimony of Bill White, Chief Assistant Public Defender for the Fourth Judicial Circuit of Florida. (R.A. 11-18).[1] Mr. White found Mr. Williams' and Mr. Echarte's handling of the penalty phase to have been markedly below the standards required by the Constitution. He testified:

> With respect to the penalty phase, I believe that Mr. Harris did not receive effective assistance of counsel and that the conduct of counsel in not first, finding, second, interviewing, third, making an informed decision whether to use, and fourth, using the witnesses that we've heard from today, along with other aspects that I reviewed in the file such as military records of Mr. Harris, that was not in accordance then existing and does not comport with constitutional requirements of the right to counsel and the reliability we seek in capital sentencing hearings.

Id. at 14.

---

1 Mr. White has served (in various capacities, including chairman) on the Executive Council of the Criminal Law Section of the Florida Bar, and Sentencing Committee of the Criminal Law Section, the Jury Instruction Committee, the Committee for Representation of Indigents (and a sub-committee on capital cases) and the Supreme Court Committee on the Rules of Criminal Procedure. He has taught trial practice at several Law Schools and to Public Defenders and has lectured on various aspects of the death penalty. He was qualified as an expert in this case without objection. (R.A. 11-13).

Having himself witnessed the testimony of the family and friends of Mr. Harris at the Rule 3.850 hearing, Mr. White opined that in his view these witnesses were impressive in appearance, demeanor and in the content of their testimony and that their testimony might well have affected the outcome of penalty trial:

> [I] think their demeanor was excellent. These are good people, and when you're evaluating penalty phase evidence it's not often that you have people that are as articulate. They don't present normally the appearance that these people presented today. These seem like very good people, very sincere people, and the value that I see in the testimony of family members and close friends is that when you try a capital case, the guilt phase is most often limited to either a few moments, a few hours or a very short period of time in a person's life, and the penalty phase, the non-statutory mitigating factors that I could see being established by this family is the portrayal of another side to an individual in this case, Theodore Harris, showing that the man had a loving family relationship, that he was a good father, that he even in prison serves a purpose alive as opposed to dead.

Id. at 16-17.

Mr. White's conclusion, that in this trial (divided as the jury was) the testimony of the witnesses would have mattered is a conclusion now fervently (if belatedly) shared by both of Mr. Harris' trial counsel. (R.A. 10). It cries out from the record below.

REASON FOR DENYING THE WRIT

I. Misconduct of Harris' Attorneys in Connection With the Penalty Phase of Trial Constituted Ineffective Assistance of Counsel Under Long-Established and Sound Principles of Law.

In *Harris v. Dugger*, 874 F.2d at 764, the Court of Appeals held that during the sentencing phase of his trial, Mr. Harris was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments. The misconduct of Mr. Harris' attorneys took the form of nonfeasance rather than misfeasance. Neither of Mr. Harris' attorneys took any steps to prepare for the sentencing phase of his trial. This was not a matter of strategy. Neither felt any effort was necessary because each thought the other was working with an investigator to gather witnesses in preparation for sentencing. Each was wrong. Neither attorney was supervising the investigation; neither attorney was consulting or working with an investigator; neither attorney was making any effort whatsoever to prepare for Mr. Harris' sentencing.

The Court of Appeals in reviewing these facts concluded that:

> [P]rior to the day of sentencing, neither lawyer had investigated Harris' family, scholastic, military and employment background, leading to their total—and admitted—ignorance about the type of mitigation evidence available to them. Such ignorance precluded Williams and Echarte from making strategic decisions on whether to introduce testimony from Harris' friends and relatives.

Id. at 763. Notwithstanding the egregious failure of counsel in this case to act, the standard has long been set at a higher level:

> It should be beyond cavil that an attorney who fails altogether to make any preparation for the penalty phase of capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness.

Blake v. Kemp, 758 F.2d 523, 533 (11th Cir.), *cert. denied*, 474 U.S. 988 (1985).

Moreover, in Mr. Harris' case, the trial attorneys went far beyond even the egregious non-feasance that is indicated in the record below: they actually (if falsely) told the jury in summation that Mr. Harris' family was not present because they had abandoned him. As the unrebutted expert testified below:

> In fact, I think one of the most disturbing things about the argument made to the jury was part of the closing argument where Mr. Williams discussed the fact that the family did not like him and did not get along with him and portrayed a picture with this jury, not knowing he had family in Jacksonville and without knowing who these people were that we saw today, they could very well form the impression that Mr. Harris was not loved by his mother and father, was not loved by his children, not loved by his close friends because the broad brush was painted with the phrase his family didn't like him and he grew up without familial support.
>
> It wasn't just leaving out testimony. It was the devastating impact of telling the jury his family didn't like him, and there was no context for that.

(R.A. 17).

This combination of non- and misfeasance, as a unanimous Court of Appeals correctly recognized, simply fails to pass muster under well-established principles of law. *Strickland*, 466 U.S. at 686 ("the right to counsel is the right to the effective assistance of counsel") (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970)).

II. The Evidence the Sentencing Jury and the Sentencing Judge Never Heard Is Relevant and Significant As A Matter of Law: The Sentencing Court and Jury Were Entitled To Understand That Harris' Life, Flawed As It Was, Had Value to His Family and Mattered to His Community.

Having shown that his lawyers' actions fell outside "the wide range of professionally competent assistance," Mr. Harris demonstrated to the Court of Appeals that but for this deficiency there was a reasonable probability that the result of the proceeding would have been different. *Harris v. Dugger*, 874 F.2d at 762. In considering whether the defendant was prejudiced by his lawyer's incompetence, the Court of Appeals asked whether "the jury's attention" was "focused on the 'particularized nature of the crime and the particularized characteristics of the individual defendant.' " *Id.* at 763 (quoting *Gregg v. Georgia*, 428 U.S. 153, 206 (1976)).

As the record demonstrates, and as the Court below correctly found, by the time of the trial's penalty phase the "jury knew much about the crime, having just convicted Harris of a brutal murder, but little about the characteristics of the defendant." *Id.* They did not know that his family was willing to testify that they loved him despite his having committed this crime. They did not know that his family and his minister would describe him "as a decent loving man whose life was important to them." *Id.* Worse, as we show above, *see supra* pp. 6-7, they erroneously heard the very opposite from the mouth of Mr. Harris' own lawyer!

The narrow margin by which Mr. Harris received the death penalty further shows that his sentence was not a foregone conclusion. It reflects the special circumstances of this case. As the unanimous panel of the Court of Appeals pointed out:

> [m]any death penalty cases involve planned murders . . . here the evidence fails to show that the appellant set out to kill Essie Daniels when he entered her home. Instead, the appellant appears to have embarked on a weaponless bur-

> glary during which he was surprised by the victim who produced the knife and apparently struck the first blow.

Harris v. Dugger, 874 F.2d at 763-64.

The state's evidence at trial, which at least four jurors found convincing at the penalty phase, was that Mr. Harris expected the Daniels' house to be empty, and entered it unarmed. When he saw Daniels, she was wielding a large kitchen knife. There ensued a desperate struggle. During the struggle, she wounded Mr. Harris so badly that he required extensive orthopaedic surgery to regain limited use of his hand. While nothing in law or morality excuses her killing, the facts here could hardly differ more strikingly from those in, say, *Strickland v. Washington*, 466 U.S. at 671-75.

There are ample reasonable grounds to believe that had the jury not been prejudiced by Mr. Harris' failure to present witnesses, they might well have returned a different verdict. Even after convicting Mr. Harris of the crime and after hearing from defense and prosecution that he was abandoned by his family, four of the twelve jurors who had just convicted him of murder voted against sentencing Mr. Harris to death. Had two more jurors agreed, Mr. Harris would likely not have received the death penalty. Given the small number of jurors who would have had to vote differently, and given the unusual facts of the killing itself, evidence tending to show that Mr. Harris' life was of value to others would more probably than not have been beneficial to his defense, as a matter of law and as a matter of plain common sense. The Court of Appeals did not err in so assessing the record.

III. The 3.850 Court's Wholesale Rejection of the Family and Friends' Testimony is Irrelevant to the Question of Law Correctly Determined by the Court of Appeals.

In granting Mr. Harris' petition for a writ of habeas corpus, the Court of Appeals did not in any way overrule appropriate state court fact-finding. The Court of Appeals properly did not invoke 28 U.S.C. § 2254(d) (1982), in its evaluation of Mr. Harris' ineffective assistance claim, since the facts upon which that claim rests were not then and are not now in contest. Although noting Judge Morphonios' intemperate conclusion that the testimony of the witnesses "would not, in any way, shape or form, have altered the verdict that the original jury reached", (R.A. 43), the Court of Appeals correctly did not grant these statements the weight of jury determinations or of judicial fact-finding. The Court of Appeals' decision that Mr. Harris was prejudiced by ineffective assistance was based on its application of the relevant legal standards as outlined in *Strickland*, not on a revisiting of factual findings.

Moreover, even petitioner's characterization of Judge Morphonios' findings does not support its arguments. Judge Morphonios did not declare the witnesses she heard incredible on the topic of their affection for Mr. Harris or his value to them as a person. Her skepticism was directed at "statements by some of the witnesses as to what a good fellow Mr. Harris was, as to what a fine person he was . . . ." (Pet. App. at A.54). Mr. Harris is a convicted murderer, and each witness testified that he or she knew it. Character witnesses were not offered to prove him "a fine person" but rather a person whose life, even while permanently incarcerated, had value to his family and to others. Nothing in Judge Morphonios' "findings" contradicts the central message of the witnesses' testimony: that some upright members of Mr. Harris' family and community loved him and valued his life, and were willing to testify to try to save that life.

The comments made by Judge Morphonios, while arguably couched as credibility determinations, are in fact determinations of law, fully reviewable in the federal courts: they really

amount to a finding of "no prejudice" under the *Strickland* test, not a judgment as to witness demeanor, and each of the subsequent reviewing Courts treated them in this view. *See, e.g., Harris v. Wainright*, 473 So.2d at 1247 (Overton, J.); *Harris v. State*, 528 So.2d at 364 (Overton, J.); *Id.* (Ehrlich, C.J., specially concurring); *Id.* at 365 (Shaw, J., specially concurring); *Id.* (Barkett, J., dissenting); *Id.* at 367 (Kogan, J., dissenting); *Harris v. Wainright*, Pet. App. A. 22-23 (Paine, J.); *See also Strickland*, 466 U.S. at 698 ("in a federal habeus challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the court"). Moreover, these comments were made seven years after the trial by a judge who was not present at Mr. Harris' trial or sentencing. Because these judgements were couched as a credibility determination, the state 3.850 judge never reached the next step and never weighed the presence of character witnesses against their absence. The value of character witnesses to Mr. Harris was not that the jury would acquit him based on their testimony. He had already been convicted. Their value was to show that Mr. Harris was loved and his life valued by his family and community. Even Judge Morphonios never characterized the witnesses as insincere or uncaring. Indeed, she found them willing and eager to testify on Mr. Harris' behalf. This willingness to testify for him is itself a mitigating factor. The exact content of their words is less important than their desire to express their love for Mr. Harris as a friend and relative.

This point is highlighted in the expert's testimony, unrebutted on the record below. He pointed out that the witnesses' demeanor "was excellent . . . showing that the man had a loving family relationship, that he was a good father, that he even in prison serves a purpose alive as opposed to dead." (R.A. 16-17). The matter was well put by the dissenters on the Florida Supreme Court, whose views were later adopted by the Court of Appeals below:

BARKETT, Justice, dissenting.

I respectfully but emphatically dissent.

In my view, this case presents a glaring example of prejudicial ineffectiveness. Contrary to what the majority opinion suggests, Harris presented no evidence during the penalty phase not because of the unavailability of witnesses but because his two lawyers, prior to the day the penalty phase began, had not devoted a single hour of their time to preparing for that phase of the trial. And, as the testimony at the evidentiary hearing below made clear, defense counsels' complete and utter failure to investigate, prepare, or present mitigating evidence during the penalty phase was not the result of a reasoned strategic decision but was due to the fact each believed the other was preparing the penalty phase of the trial. *The testimony at the hearing below was unequivocal on this point: Both attorneys testified that they erred, that their conduct was below acceptable norms, and that they would have presented the mitigating evidence now brought to light had they known of its existence.*

It cannot be denied that such conduct falls far short of Strickland*'s requirement of reasonably adequate assistance. As the Supreme Court noted in* Strickland, *"counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691, 104 S.Ct. at 2066. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."* Id. *In this case, because each counsel believed the other was responsible for the penalty phase, there was no decision not to investigate. Counsels' failure most clearly was not the result of reasoned professional judgment, and, in my view, "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."* Strickland, *466 U.S. at 687, 104 S.Ct. at 2064.* See also Blake v. Kemp, *758 F.2d*

523, 533 (11th Cir. 1985) ("It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness"), cert. denied, *474 U.S. 998, 106 S.Ct. 374, 88 L.Ed.2d 367 (1985). Courts have found deficient performance based upon errors less far-reaching than counsels' error in this case.* See Tyler v. Kemp, *755 F.2d 741 (11th Cir. 1985);* Armstrong v. Dugger, *833 F.2d 1430 (11th Cir. 1987);* King v. Strickland, *748 F.2d 1462 (11th Cir. 1984)*, cert. denied, *471 U.S. 1016, 105 S.Ct. 2020, 85 L.Ed.2d 301 (1985).*

Turning to the second prong of the Strickland *test, I cannot agree that Harris was not prejudiced by his counsels' deficient performance. My reasons are threefold: first, without hearing any evidence in mitigation whatsoever during the penalty phase, four of the twelve jurors voted for life imprisonment.*

Second, the circumstances of the murder in this case differ markedly from those in Strickland. *In* Strickland, *the defendant planned and committed a series of crimes, which included three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft. 466 U.S. at 671-72, 104 S.Ct. at 2056. Furthermore, the defendant in* Strickland *confessed and pleaded guilty to all charges, then waived his right both to a jury trial and a penalty phase advisory jury.* Id.

In contrast, the murder here was not planned but resulted from a burglary gone awry. The evidence indicates that Harris entered the victim's house believing it to be unoccupied and was surprised by the victim. In the ensuing struggle, the victim was killed and Harris himself injured. Under such circumstances, I believe there is a reasonable probability that character testimony might have affected the outcome.

Third, I do not agree that because the state may have sought to introduce evidence of prior bad acts by Harris, Harris was not prejudiced by the absence of the character evidence. Harris stood convicted of the stabbing murder of an elderly woman. The jury already knew he was on parole at the time. Thus, the jury was aware of much that was damaging to Harris. The testimony of his family and friends, however, would have presented another side to Mr. Harris' character, demonstrating that he was not totally reprehensible and, even in prison, his life could serve some useful purpose. Rehabilitative potential unquestionably is valid mitigating evidence. Skipper v. South Carolina, *476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986);* McCampbell v. State, *421 So.2d 1072, 1075-76 (Fla. 1982). Regardless of how any particular individual might weigh this testimony, it clearly is the type of mitigating evidence that might persuade a jury that death is not the appropriate penalty. Juries have recommended life sentences under similar circumstances.* See, e.g., Holsworth v. State, *522 So.2d 348 (Fla. 1988).*

I also believe that this case involves more than a mere weighing by this Court of the aggravating and mitigating circumstances. As the Court admonished in Strickland, *"the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." 466 U.S. at 696, 104 S.Ct. at 2069. Because his lawyers abdicated their responsibility to investigate or prepare mitigating evidence, Harris received virtually no defense at all in the penalty phase of his trial. Although counsel presented a closing argument at the penalty phase, counsel may well have done Harris more harm than good by arguing, falsely, to the jury that Harris' family had turned against him, since jurors may have interpreted this to mean he was irredeemable.*

A death sentence imposed where counsel's representation amounts to practically no representation at all does not comport with the eighth amendment's requirement of reliability in capital sentencing. As the Supreme Court

relentlessly has emphasized in its capital decisions, one of the key aspects of the penalty phase proceeding is that the sentence be individualized. Greg v. Georgia, *428 U.S. 153, 206, 96 S.Ct. 2909, 2940, 49 L.Ed.2d 859 (1976);* Lockett v. Ohio, *438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978). As the Court noted in* Woodson v. North Carolina, *428 U.S. 280, 298, 96 S.Ct. 2978, 2988, 49 L.Ed.2d 944 (1976) (quoting* Furman v. Georgia, *408 U.S. 238, 402, 92 S.Ct. 2726, 2810, 33 L.Ed.2d 346 (1972) (Burger, C.J., dissenting)), "individual culpability is not always measured by the category of the crime committed." For this reason, the death penalty may not be imposed without some "particularized consideration of relevant aspects of the character and record of each convicted defendant." 428 U.S. at 303, 96 S.Ct. at 2991 (plurality opinion). In this case, counsel failed to provide the jury with the information it needed to focus properly on the individualized characteristics of this appellant.* See Armstrong, *833 F.2d at 1433.*

Accordingly, I conclude that confidence in the outcome has been undermined, and I would vacate the death sentence and grant appellant a new sentencing proceeding.

KOGAN, J., concurs

KOGAN, ..stice, dissenting.

I concur with Justice Barkett's dissenting opinion. I would further point out that during his closing argument to the jury, appellant's trial counsel stated the following:

> I am not going to tell you—to stand here and talk to you about proof, what's been reasonable doubt, but I ask you to consider that Theodore Harris sits there and he's the only person that stands behind him when you think about the fact that his family has turned against him because of this act. He's always—and they have been against him since then. *Mr. Darby [Assistant State Attorney] asked—who comes in here to speak for him?*

Think about that. They don't want to be against him. They don't want to be for him.

This assertion, as the testimony of the witnesses at the 3.850 hearing demonstrated, was incorrect. Appellant's family and friends were not present at trial to testify on his behalf because counsel failed to properly prepare for the penalty phase portion of the trial.

Not only was appellant deprived of his right to present friendly witnesses on his behalf, but his own counsel inferred that the act for which appellant was convicted was so offensive that his family turned against him and would not appear in court to testify. There can be no question that counsel's statement severely damaged any chance appellant had for a recommendation of life imprisonment. This ineffective assistance of counsel was highly prejudicial to appellant.

I would vacate the sentence of death and remand this matter for a new sentencing proceeding before a new jury.

BARKETT, J., concurs.

Harris v. State, 528 So.2d at 365-67.

In reaching the determination that Mr. Harris was, as a matter of law, prejudiced by his counsels' failure, the Court of Appeals was well within established boundaries of the review of legal determinations of the State courts. The unanimous opinion was clearly correct and the application for the Writ should be denied.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court deny this petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

/s/ DANIEL L. RABINOWITZ, ESQ.
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JENNIFER S. BARD, ESQ.
On the Brief

No. 89-650

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD DUGGER, Secretary, Department of Corrections, State of Florida,
ROBERT BUTTERWORTH, Attorney General, State of Florida,

Petitioner,

—v.—

THEODORE CHRISTOPHER HARRIS,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

DANIEL L. RABINOWITZ, ESQ.
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JENNIFER S. BARD, ESQ.
On the Brief

Concluding Argument of Alfred J. Williams

* * *

And in this case the Judge is going to instruct you when he charges you on the law in this case at the end of my talk with you, he's going to tell you that each aggravating factor must be proved beyond and to the exclusion of a reasonable doubt, but the mitigating circumstances need not be proved beyond a reasonable doubt.

I'm not going to tell you—to stand here and talk to you about proof, what's been reasonable doubt, what's beyond and not beyond a reasonable doubt, but I ask you to consider that when you consider that Theodore Harris sits there and he's the only person that stands behind him when you think about the fact that his family has turned against him because he was accused of this act. He's always—they have been against him since then.

Mr. Darby asked—who comes in here to speak for him? Think about that. They don't want to be against him. They don't want to be for him. That's not his fault but that's why the law tells you it need not be proved beyond a reasonable doubt because if you have that doubt, you must think about it long and hard because we're not just talking about words or facts or cases; we're talking about a human being. We're talking about the life of another man.

And the only thing you have to hide behind to burden your decision—to bear on your decision, help you bear your burden would be the law, the same thing so many people have used for years to hide behind the law, just because it says, he wants you to go ahead and do the maximum.

I believe that the law is a creature of most people who speak out. That's what it comes down to. None of us have ever sat in Tallahassee, wrote out one law. Somebody else wrote it out and tells us we should live by it.

I'm not telling you we shouldn't live by the law because the law's good, but when it comes down to the law to commanding us to to things that are against human dignity, there comes a cut-off point. There is a cut-off point.

R.A. 2

In Nazi Germany they hid behind the law because they were following orders in what they did. Like I say, in slavery they hid behind the law, doing what they do, saying that's the law, kill the black people. During wars lots of soldiers in Viet Nam hid behind the law when they massacred defenseless women, kids, but that doesn't make it right.

* * *

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 81-7561 (Morphonios)

STATE OF FLORIDA, *Plaintiff,*

—vs.—

THEODORE HARRIS, *Defendant.*

Transcript of proceedings had in the above-styled cause, before the Honorable Ellen J. Morphonios, Circuit Court Judge, at the Metropolitan Justice Building, 1351 N.W. 12th Street, Miami, Florida, on the 6th day of June, 1988, commencing at 3:20 p.m.

APPEARANCES:

JANET RENO, STATE ATTORNEY
BY: DAVID GILBERT, ASSITANT STATE ATTORNEY
On behalf of the State.

ATTORNEY GENERAL'S OFFICE
BY: CHARLES M. FAHLBUSCH, ASSISTANT ATTORNEY GENERAL
and JONI B. BRAUNSTEIN, ASSISTANT ATTORNEY GENERAL
On behalf of the State.

MCCARTER & ENGLISH
BY: DANIEL L. RABINOWITZ, ESQUIRE
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102-4096
On behalf of the Defendant.

Trial Testimony of Alfred J. Williams

DIRECT EXAMINATION

BY MR. RABINOWITZ:

Q. Mr. Williams, will you state your name, please, for the record?

A. Alfred J. Williams.

Q. Where are you employed, sir?

A. In the Dade County Public Defender's Office.

Q. What capacity?

A. As senior trial attorney.

Q. Mr. Williams, were you employed in the Dade County Public Defender's office in 1981?

A. Yes.

Q. And in what capacity were you [5] employed there in '81?

A. In '81, I believe I was a regular assistant.

Q. Mr. Williams, in 1981 were you assigned to represent Theodore Harris, the Petitioner in this matter?

A. Yes.

Q. And was that the first capital case that you had been responsible for?

A. Yes, it was.

Q. Were you assigned a colleague to work with in connection with that representation?

A. Pedro Echarte.

Q. Mr. Williams, during your representation of Mr. Harris, did you at any time confer with any of the following people: Janice Fuller?

A. No.

Q. Hank Fuller?

A. No.

Q. LaShawn Fuller?

A. Well, the names don't ring a bell. If you can tell me the relationship to the Defendant, it may make a difference, but I don't recall the names of those people.

[6] Q. Did you confer with Mr. Harris' parents?

A. No.

Q. Did you confer with any of Mr. Harris' former employers who are friends, including Wayne Carswell, Robin Smith, Gail Smith, Jack Robinson, Charles Francis, Gene Tarver, Ila Benton, or Thelma Thomas?

A. The name Carswell and Robin Smith ring a bell.

Q. Okay. Do you recall actually conferring with them?

A. I recall conferring with Robin Smith and I believe I talked to Mr. Carswell via the telephone.

Q. Did you subpoena or review Mr. Harris' military records?

A. No, I didn't.

Q. Did you subpoena or review his school records?

A. No, I didn't.

Q. Did you ever go to Jacksonville to visit the Harris family?

A. No, I didn't.

Q. Did you ever visit the neighborhood [7] where Mr. Harris grew up or was raised?

A. No, I didn't.

Q. Have you had the opportunity to examine the affidavits submitted by witnesses in connection with this 3.850 Petition?

A. Yes, I have.

Q. Were you aware of the information in those affidavits in 1981 at the time of the trial?

A. Well, there were several affidavits. The information, some of it I was aware of, but not from those particular people.

Q. Now, Mr. Williams, who was responsible for the preparation of the penalty phase of this case as between yourself and Mr. Echarte?

A. Mr. Echarte.

Q. Now, in connection with that preparation, Mr. Williams, were you aware of the Red Cross commendations Mr. Harris earned while in the Army?

A. No, I wasn't.

Q. When you learned that Christine Harris was hospitalized at the time of the penalty hearing, did you contact her doctor or [8] the hospital independently to solicit their assistance in verifying that in order to secure a further adjournment from Judge Scott?

A. I personally didn't.

* * *

[12] * * *

Q. (By Mr. Rabinowitz) Mr. Williams, in [13] connection with the penaly phase in this trial, you presented no witnesses; isn't that correct?

A. As best as I recall.

Q. And, Mr. Williams, have you had the opportunity to review the transcript of the penalty phase of this case?

A. The transcript of the penalty phase?

Q. Yes, sir.

A. Not entirely, no.

Q. Mr. Williams, at the time that you were conducting Mr. Harris' defense, would you summarize for the Court what some of your other responsibilities were?

THE COURT: You mean over all, his whole work?

MR. RABINOWITZ: Yes, Your Honor, his work load.

THE COURT: Okay.

MR. RABINOWITZ: The competing demands upon his time and attention.

THE COURT: Go ahead.

A. Back about that time the office, what I would consider was like at an all time low. There were a lot of people had just left. [14] We had an influx of cases. I might have had about at least five first degree murders, myself, as well as a full case load at that time.

It was regular every day in court, regular P.D. duties, I guess.

Q. (By Rabinowitz) With regard to the Harris case in particular, looking back on it, do you believe that you devoted an adequate amount of time, attention and energy to investigating and preparing a penalty phase presentation?

A. Well, no, I did not, but that really—my primary responsibility was the trial phase.

Q. Okay. Do you believe that Mr. Echarte devoted an adequate amount of time and attention to the penalty phase viewed from today's perspective?

A. Viewed from today's perspective, no, I don't.

* * *

Trial Testimony of Pedro Echarte

DIRECT EXAMINATION

BY MR. RABINOWITZ:

Q. Sir, would you state your name, please?
A. Pedro Echarte.
Q. Mr. Echarte, how are you employed?
A. As an attorney.
Q. In 1981, how were you employed?
A. As an Assistant Public Defender in Dade County.
Q. In that connection, Mr. Echarte, were you one of two attorneys assigned to represent the defendant in this matter, Theodore Christopher Harris?
A. Yes.
Q. Who was the other attorney with you?
A. Alfred Williams.
Q. Mr. Echarte, during the course of your representation of Mr. Harris, did you at [12] any time confer with Mr. Harris' family?
A. No.
Q. Mr. Harris, did you speak or confer with Janice Fuller?
A. No.
Q. Hank Fuller?
A. No.
Q. Curtis Harris?
A. No.
Q. LaShawn Fuller?
A. No.
Q. John Harris?
A. No.
Q. Christine Harris?
A. No.
Q. Mr. Harris' parents?
A. No.
Q. Did you at any time during your representation of Mr. Harris confer with or speak to any of Mr. Harris' former employers or friends?

A. No.
Q. Including Wayne Carswell?
A. No.
Q. Robin Smith?
[13] A. No.
Q. Gail Smith?
A. No.
Q. Jackie Robinson?
A. No.
Q. Charles Francis, Jr.?
A. No.
Q. Jeanie Tarver?
A. No.
Q. Marie Hill?
A. No.
Q. Ila Benton?
A. No.
Q. Annie Williams?
A. No.
Q. Or Thelma Thomas?
A. No.
Q. Mr. Echarte, did you subpoena or otherwise have occasion to obtain and review Mr. Harris' school records?
A. I did not.
Q. His Army service records?
A. No.
Q. Or the like?
A. I did not.
[14] Q. Mr. Harris, between you and Mr. Williams, which of you was responsible for the preparation of the penalty phase in this trial?
A. Mr. Williams.
Q. Mr. Echarte, did you ever go to Jacksonville to visit the Harris family?
A. No.
Q. Did you ever visit the neighborhood where Mr. Harris grew up?
A. I did not.

Q. Did you ever assign an investigator to do so on your behalf?

A. I did not.

Q. Mr. Echarte, did you ever spend time sitting with Mr. Harris to discuss his background and his personal history in preparation for the penalty phase?

A. I did not.

Q. Mr. Harris—I am sorry, Mr. Echarte, when you learned that Christine Harris was in the hospital and unavailable for testimony, did you contact her doctor or the hospital to solicit their assistance in verifying this in order to secure an adjournment from Judge Scott?

A. I did not.

[15] Q. Mr. Echarte, how many times did you actually meet with Mr. Harris?

A. Two or three occasions.

Q. During those times, at any time did you discuss a potential penalty phase presentation?

A. I did not.

Q. Did you at any time solicit a meeting with Mr. Harris in order to elicit from him information which would be relevant as mitigating circumstances in a potential penalty phase?

A. I did not.

Q. Mr. Echarte, during the course of your representation of Mr. Harris, did you have discussions with Mr. Williams with regard to the likely outcome of the guilt phase of the case?

A. Yes.

Q. And would you tell us what Mr. Williams' views as expressed to you were on that subject?

A. That we would prevail.

Q. Mr. Echarte, had you been aware at the time of the existence of family members, former employers and friends of Mr. Harris [16] from his childhood home in Jacksonville that would have wished to testify in his behalf in a mitigation proceeding, would you have presented such testimony?

A. Absolutely.

Q. Do you think, Mr. Echarte, under the circumstances of this case as you now sit there that such testimony might have made a difference in the jury's recommendation?

A. Absolutely.

MR. RABINOWITZ: I have no further questions, Your Honor.

Trial Testimony of William White

DIRECT EXAMINATION

BY MR. RABINOWITZ:

Q. Mr. White, by whom are you employed?

A. Lewis O. Frost, Jr., the elected Public Defender for the Fourth Judicial Circuit of Florida.

Q. What position do you hold in Mr. Frost's office?

A. The designation is Chief Assistant Public Defender.

[141] Q. Mr. White, would you give us a brief summary of your career?

A. In 1973 I was attending the University of Florida Law School. I participated in what is called an externship, it's the equivalent of an internship, in the office of the Public Defender in Jacksonville. That's in the Fourth Judicial Circuit.

In July of 1974 I was hired as a graduate law student and, upon passing the Bar in December of 1974, I became an Assistant Public Defender.

In July of 1976, primarily I think due to attrition in the office, I became Chief Assistant, and I've been in that position since that time.

Q. Well, the longevity can't be due to attrition, Mr. White.

Mr. White, to what bars are you admitted?

A. The Florida Bar, the Middle District of Florida, the Federal District Court for the Middle District of Florida, the 11th Circuit, Federal Circuit, and the Supreme Court of the United States.

[142] Q. Can you give us a brief summary of some of the bar and professional organizational committees that you have either served on or chaired?

A. The—I think the most significant, I've served on the Executive Counsel of the Criminal Law Section for a number of years. I am this year the Treasurer of the Criminal Law Section of the Florida Bar, next year the secretary, and the year after that chairman elect, and the year after that chairman.

I've served on the Sentencing Committee of the Criminal Law Section, the Jury Instruction—I chaired the Jury Instruc-

tion Committee of the Criminal Law Section during the revision of our standard jury instructions for criminal cases. I've served on the Committee for Representation of Indigents and a number of other committees of the Criminal Law Section.

I'm also a member of the Criminal Rules—Criminal Procedure Rules Committee of the Supreme Court of Florida and, beginning in July, I'm the vice-chairman of that committee.

Q. Have any of your committee assignments brought you into contact with [143] Florida's death penalty issues?

A. Yes. The Committee on Representation of Indigents had a collateral committee, which was a committee I am relating to Representation of Indigents in capital cases. Those two committees, I've served as the chair person of both committees and I've served on both committees and I have lectured on various aspects of the death penalty during my tenure as Assistant Public Defender.

Q. Can you give us a brief summary of some of your teaching credentials?

A. I have been a member of the teaching team at the University of Florida for about nine years teaching the Public Defender/State Attorney training seminar. I've done—performed basically the same role at Nova University Law School and at Florida State University Law School where I've taught their trial practice programs, and also the Public Defender/State Attorney program at Nova, which is no longer held there.

I have also served on a committee of the Advanced Trial Advocacy Committee of the Public Defender Association. My most recent teaching, I just spent a week as a team leader in [144] Tallahassee teaching the Advanced Trial Advocacy Program for Public Defenders and I'm scheduled to teach again at the Public Defender/State Attorney seminar to be held at the University of Florida Law Center, Highland Law Center in August of this year.

* * *

Q. Mr. White, have you ever been qualified as an expert in any post-conviction proceeding?

A. Yes, I have.

Q. Regarding death penalty issues?

A. Several times.

Q. Would you tell us when the most recent such qualifications occurred?

A. I believe the most recent qualifications was before Judge Morphonios in the Leon Scott case some few years ago. Prior to that there were several occasions in Jacksonville [145] in the Middle District, Federal District for the Middle District and in the Federal Court in the Fourth Judicial Circuit, David Raulerson, Ernest John Dobbert and some others.

Q. I notice, Mr. White, that your serving as such an expert has not been recent; isn't that correct?

A. That's correct.

Q. It's not something that you do frequently; is that right?

A. It's something that I have been very hesitant to do. I work within the Public Defender Association. I work with Public Defenders, I train Public Defenders, I learn from Public Defenders, and if I could have found anyone else to do this today, I would have recommended them to you.

* * *

[146] MR. RABINOWITZ: Your Honor, I'm going to offer Mr. White as an expert and allow Mr. Gilbert to voir dire on his qualifications.

MR. GILBERT: If you've already declared him as an expert before, I'm in a bit of a hold.

THE COURT: Yes, you are.
Declare him an expert.

Q. Mr. White, in connection with the pending proceeding, have you had the opportunity to review the trial transcripts in the case of State against Theodore Christopher Harris, Criminal Number 81-7561?

A. Yes. You supplied me a copy of the trial transcript and the legal pleadings that have occurred post conviction in this case. I've read those.

Q. Have you had the opportunity to hear the testimony of the witnesses who testified here today?

A. Yes.

Q. Based upon your expertise and based upon your review of the transcripts and your review of the pleadings and your review of the testimony that the witnesses had to offer here [147] today, have you had the occasion to form an opinion as to whether the conduct of the Assistant Public Defenders who represented Mr. Harris was, in connection with the penalty phase, in accordance with the then prevailing standards for adequate representation for defendants in capital cases in 1981 in urban Public Defender offices?

A. I have.

Q. Moreover, have you formed a conclusion as to whether that representation in that connection was in accordance with Constitutionally mandated norms of defense conduct in 1981 or at the present time?

A. I have.

Q. And would you tell us what your opinions are with respect to each of those questions?

A. With respect to the penalty phase, I believe that Mr. Harris did not receive effective representation of counsel and that the conduct of counsel in not first finding, second, interviewing, and, third, making an informed decision whether to use and, fourth, using the witnesses that we've heard from today, along with [148] other aspects that I reviewed in the file such as military records of Mr. Harris, that that was not in accordance with the standards then existing and does not comport with Constitutional requirements of the right to counsel and the reliability that we seek in capital sentencing hearings.

* * *

[149] * * *

Q. Now, Mr. White, I'd like to go back to the initial question of the investigation and preparation and presentation of a mitigating phase case.

Would you describe for us what you believe the Constitutional norms require of Public Defender defense counsel in connection with such a trial?

A. Since my employment in the Public Defender's Office there's been a virtual [150] revolution in the amount of information that's available to lawyers about this, but most of that information really is not that far removed from what was available to lawyers before we had a controversy over the death penalty in the State of Florida, before the declaration of the unConstitutionality [sic] of our former statute and the reinstitution of the death penalty under our new statute.

Q. Was that information available to lawyers in urban Public Defenders' offices in 1981?

A. Yes, it was, but it was available before that. Most of the information that we've heard here today would have been disclosed by a simple interview form.

Most of the interview forms used by Public Defenders' offices around the State, and the one used in Miami is fairly detailed, require the client to give next of kin, spouse, exspouses, military history, employment, their past usually two or three jobs. That's just a standard interview form for a nonstandard capital case.

Most of the information that was [151] disclosed here today would have been found through just using that simple interview form.

We use a much more extensive form in the office of the Public Defender today. We did then use a much more extensive form in the capital case seeking life history, looking for military records, particularly Vietnam experience if it was available, but any acts in the military that were—would reflect favorably upon the accused.

We would get school records, full school records disclosed to us, medical records, mental health records, the history of any medical problems that the individual might have that could lead to discovering mitigating circumstance.

Usually in the course of going through those records you will find collateral witnesses, people who might not have been disclosed in an initial witness interview or client interview, and those are pursued further to find out if there is evidence which would lead to the establishment of a statutory or non-statutory mitigating circumstance.

This doesn't seem to be a difficult [152] case to me in terms of finding the evidence, so I don't believe that the work that's been done on the death penalty—the emphasis that we've placed in the criminal justice system on the death penalty since 1972 has that much of a bearing on finding these witnesses. It's just practice of law.

When you represent a criminal defendant, you're going to get some basic information. Obviously the stakes are higher in a capital case. You're going to pursue that information further, and it really would not have been difficult to find these witnesses in my opinion.

* * *

[154] * * *

I think the heart of the ineffectiveness in this case is not knowing what was available, but not seeking out that information that was available.

Q. And you believe that it is the lawyer—that the Constitutional norm as well as the normal standards of Public Defender conduct in Florida and urban offices in 1981 required affirmative action on the part of the defense [155] lawyers to find and seek such testimony out; isn't that right?

A. Yes, and I don't distinguish between Public Defender standards and private attorney standards.

Q. Okay. Have you had the opportunity to listen to the witnesses who testified today?

A. Yes, I have.

Q. And have you had the opportunity to evaluate their demeanor?

A. Yes, I have.

Q. And can you give us your view as to what sort of impact such witnesses would have on a jury and panel on the trial of a sentencing phase?

A. If that's within the purview of my testimony, I think their demeanor was excellent. These are good people, and when you're evaluating penalty phase evidence it's not often that you have people that are as articulate. They don't present normally the appearance that these people presented today.

These seem like very good people, very sincere people, and the value that I see in the testimony of family members and close friends **[156]** is that when you try a capital case, the guilt phase is most often limited to either a few moments, a few hours or a very short period of time in a person's life, and the penalty phase, the non-statutory mitigating factors that I could see being established by this family is the portrayal of another side to an individual, in this case, Theodore Harris, showing that the man had a loving family relationship, that he was a good father, that he even in prison serves a purpose alive as opposed to dead.

It's just invaluable in current practice and in 1981 to have a life recommendation, and I can't say what a jury would have responded to and I can't tell you what the jury would have done with these witnesses, but I would have put them on.

Q. In that connection, I take it that it forms a part of the basis for your opinion that the jury in this case did not know that Mr. Harris was married, did not know that Mr. Harris was a father, did not know of Mr. Harris' other familial relationships, did not know the strength and detail of the web connecting Mr. Harris to the community in which **[157]** he grew up?

A. I think it goes beyond that. In fact, I think one of the most disturbing things about the argument made to the jury was part of the closing argument where Mr. Williams discussed the fact that the family did not like him and did not get along with him and portrayed a picture with this jury, not knowing he had family in Jacksonville and without knowing who these people were that we saw today, they could very well form the impression that Mr. Harris was not loved by his mother and father, was not loved by his children, not loved by his close friends because the broad brush was painted with the phrase his family didn't like him and he grew up without familial support.

It wasn't just leaving out testimony. It was the devastating impact of telling the jury his family didn't like him, and there was no context for that. It wasn't set up in terms of a deprived childhood or someone who developed a learning disability or had some mental problem because of the family not liking him.

It was just thrown out there with **[158]** the family not liking him with no explanation, in the same way that a hint of some

mental health problems and some hint of drug problems would be thrown out, again, without any context and without any framework to make it mitigating circumstances. It was just thrown out as something that could scare—

Q. Indeed without any one iota of record support of the transcript, which you perused?

A. And with respect to the family aspect it was apparently false, or totally false as we've seen here today.

* * *

Trial Testimony of LaShawn Harris

DIRECT EXAMINATION

BY MR. RABINOWITZ:

Q. Would you state your name and address for the record, please?

A. My name is LaShawn Harris.

THE COURT: How do you spell that?

THE WITNESS: Capital L, A, capital S, H-A-W-N.

* * *

[58] * * *

How old are you?

A. I'm 22 years old.

Q. With whom do you live?

A. I stay at my parents'.

Q. Who are your parents?

A. Janice Fuller and Henry Fuller.

Q. And what is your educational background?

A. I'm a student at the Florida Community College, Downtown Campus, in Jacksonville, Florida.

Q. And are you currently employed?

A. Yes, I am.

Q. In what capacity?

* * *

A. I work at Cuco's, a Mexican restaurant in Jacksonville, Florida.

Q. Thank you.

And what do you do in the Army National Guard?

[59] A. I'm a material supply specialist.

Q. How did you come to be interested in military service?

A. Through my uncle and through my father.

Q. To whom are you referring when you talk about your uncle?

A. Theodore Harris.

Q. Is that Mr. Harris sitting here at counsel table?

A. Yes.

Q. Do you have any future plans with respect to military service?

A. I plan on staying in the Florida National Guard for at least six more years.

Q. How long have you known Mr. Harris?

A. All my life.

Q. Could you describe your relationship to Mr. Harris?

A. He is a good uncle to me. He gave me the encouragement to continue with my military career.

Q. And has he been of help to you with any other aspects of your life?

A. Yes, my college. He helps me out a **[60]** lot with my college background.

Q. And can you describe that a little more fully to the Court?

A. Well, I'm in the process of graduating from FCCJ in another year or so.

Q. Now, since Mr. Harris has been incarcerated, have you and he communicated with each other?

A. Yes. I write to him.

Q. And does he write to you?

A. Yes, he does.

Q. Have you visited him at the prison?

A. No, I haven't had a chance to visit him yet.

Q. What sorts of things do you tell him in your letters?

A. Well, mostly tell him how my military career is coming along and how far I done got along in my college.

Q. And what sorts of things has he said to you in his letters to you?

A. Just—he gave me like encouragement to continue the good work and to let him know what else I continued, what I want to do.

Q. Has Mr. Harris been a significant **[61]** influence in your life?

A. Yes, he has.

Q. Has that been an influence for the good?

A. Yes, it have.

Q. You're aware, aren't you, that Mr. Harris has had a persistent difficulty in conforming his conduct to the law?

A. Yes.

Q. In fact, he's been convicted of several offenses; isn't that correct?

A. Yes, he have.

Q. And he's here because he was convicted of murder? You understood that, didn't you?

A. Yes, yes, I do.

Q. Do you think Mr. Harris, even under those circumstances, can be of help to you in the remainder of your life, even if he remained in prison?

A. Yes, he can.

Q. What leads you to believe that?

A. He's somewhat of an advisor, you know. He gives me a lot of encouragement through his letters and just the knowledge that he's **[62]** there, you know.

Q. How old were you in 1981?

A. I was 15.

Q. And were you close to Mr. Harris at that time as well?

A. Yes, I was.

Q. Did anyone ever contact you—

A. No.

Q. —in 1981—

A. No.

Q. —about the possibility of testifying at Mr. Harris' trial?

A. No.

Q. Did anyone, to your knowledge, contact your parents at that time?

A. No.

Q. Were you ever asked to come to Miami to testify about Mr. Harris' character?

A. No, I wasn't.

Q. Did you know back then that you could have come to Miami to testify about Mr. Harris' character and about your relationship to Mr. Harris in connection with the penalty phase of his trial?

A. No, I didn't.

[63] Q. Did you know exactly when his trial took place?

A. No, I didn't.

Q. Did your parents know?

A. No, they didn't, also.

Q. Did anyone ever come to you house—

A. No.

Q. —or call your parents or call you on the telephone—

A. No.

Q. —about that?

Had you been asked to testify on Mr. Harris' behalf in 1981, would you have wanted to do so?

A. Yes.

Q. And would you have done so?

A. Yes, I would.

Q. What would you have said to the Court, if you had been given the opportunity back then to testify?

A. I would have said he was a good uncle and he was a family man and he just was a good advisor for me during my career.

* * *

Trial Testimony of Henry Fuller

DIRECT EXAMINATION

BY MR. RABINOWITZ:

Q. Good morning, sir. Would you state your name for the record, please?

A. My name is Henry Fuller.

Q. Mr. Fuller, where do you reside?

A. 1842 West 26th Street, Jacksonville, Florida.

Q. How long have you lived there, sir?

A. I lived there approximately eight years.

Q. Mr. Fuller, with whom do you live at that address? With whom do you live?

A. I live with my wife, Janice Fuller.

Q. And children?

A. Yes. We have four children, stepchildren.

Q. And what is your—Janice Fuller is your wife?

A. Yes.

Q. What's your relationship to LaShawn Fuller?

A. I'm her stepfather.

[31] Q. Are you currently employed?

A. No. I just retired.

Q. What was your occupation before you retired?

A. Civil service, Jacksonville NAS, Naval Air Station.

Q. How long did you work there?

A. I worked out there approximately five years.

* * *

Q. How long have you been married to Janice Fuller?

A. 13 years.

Q. And for how long before that did you know Janice and her family?

A. I knew her about two or three years prior to that.

Q. Do you know Theodore Harris?

A. Yes.

Q. And how long have you known Harris?

A. Well, I knew him when I met my wife.

[32] Q. What's his relationship to your wife? What is Mr. Harris' relationship to your wife?

A. Brother.

Q. Could you describe your relationship with Mr. Harris for the Court?

A. Well, he was a very good friend of mine and we—it developed into a brother relationship. I used to talk to him a lot.

He's the type of person, he's real timid. If you talk with authority or something like that, he was more or less easily persuaded and I used to talk to him about that a lot. I used to sort of take him under my wing and sort of guide him like.

Q. In fact, Mr. Harris has had a number of brushes with the law over the years, has he not?

A. Yes.

Q. And did you attempt to guide him in other directions?

A. Yes.

Q. Did you have occasion to observe Mr. Harris in his relationship with other family members?

[33] A. Yes, I have.

Q. And what did you observe?

A. Well, he's a very kind-hearted person. He's a very good father towards children, and he would always express himself towards children, I thought. I felt like he would try and tell them the right things to do, even though he couldn't do them.

Q. Okay.

A. He was easily persuaded somewhat.

Q. And it was well known in the family he—

A. Oh, yes. Neighborhood, too.

Q. What kind of a father and husband was Mr. Harris?

A. To my knowledge, he was a very good father and very supportive of the children, not only his child, but also the rest of them, also. They looked up to him.

Q. And can you describe the relationship between Mr. Harris and LaShawn Fuller, your stepdaughter?

A. Well, Mr. Harris is LaShawn's uncle. She writes him, they communicated over the phone. They would go different places [34] together and everything, and he was very supportive of her, he loved her and he guided her.

Q. Do you believe that Mr. Harris has been of assistance to LaShawn despite the turmoil in Mr. Harris' own life?

A. Oh, yes, most definitely.

Q. And that's your opinion as LaShawn's stepfather?

A. That's my opinion, uh-huh.

Q. Do you believe that Mr. Harris can be of further assistance and, indeed, of guidance to you and other members of your family even if he were to be incarcerated for the remainder of his natural life?

A. Most definitely. Even now he writes to his children, you know, even my daughter, my stepdaughter, you know, and he's very supportive. He's interested in what they take up and everything and they communicate through letters. Whenever he get a chance to talk to them over the phone, he does so, plus visitations from us.

Q. Have you had the opportunity to visit Mr. Harris while he's been incarcerated?

[35] A. Oh, yes, I visit him regular. If they check the record, they would find that out.

Q. Did anyone ever ask you to testify on Mr. Harris' behalf at his 1981 trial?

A. No, they haven't.

Q. Did anyone ever contact you in connection with his 1981 trial?

A. No, they have not.

Q. Did you know that in 1981 you could have come to Miami to testify in Mr. Harris' behalf at the penalty phase of his trial?

A. I didn't know that.

Q. Would you have come to Miami to so testify had you known that that opportunity was available to you?

A. Most definitely.

Q. What would you have told the Court and the jury then if you had been given the opportunity to do so?

A. If I was given the opportunity, I would have told the Court, to a jury the same thing I'm telling them now, and the man is not a real bad man that I feel in my opinion. I don't feel like he deserved this and, even if he did, I don't think it should be like this.

[36] Q. Mr. Harris, did you ever speak with Al Williams in 1981, Mr. Harris' lawyer?

A. No, I have not.

Q. Did you ever speak with Pedro Echarte in 1981, Mr. Harris' other lawyer?

A. No, I have not.

Q. Did you ever speak with a Mr. Gary Wayne, investigator for the Public Defender's Office, in 1981?

A. No, I—no.

Q. How do you feel, Mr. Harris, about not having had the chance to come—

THE COURT: His name is Fuller.

Q. I beg your pardon, Mr. Fuller.

A. I'm very disturbed that I was not contacted, and I didn't know up until recently that I could have been a witness for him. And it really disturbs me a lot because it would have made—maybe it would have been different then than what it is now because we are very supportive of him, we all love him and he's an asset to the community.

The community know him. He was raised in the community that I live in. In fact, my wife, also. Just about all of the older [37] people know him real well.

Q. Mr. Fuller, was there ever a time in 1981 at the time of any of Mr. Harris' prior arrests and convictions when your views about him or your family's views about him were any different than the ones you've expressed here today?

A. Oh, no, no different about him. We love him and I guess it always be that way because he was more or less like a brother to me, like a baby brother.

Q. But you understand that Mr. Harris has been unable over the years to conform his own conduct to the requirements of the law?

A. Yes.

Q. But nevertheless you feel that he has been a beneficient influence in some respects in your family?

A. Oh, yes, most definitely.

MR. RABINOWITZ: I have no further questions, Your Honor.

* * *

Trial Testimony of Wayne Carswell

DIRECT EXAMINATION

BY MR. RABINOWITZ:

Q. Sir, would you state your name and your address for the record, please?

A. Wayne Carswell, 11291 Hart Road, Apartment Number 2206, Jacksonville, Florida.

Q. Mr. Carswell, how long have you lived in Jacksonville?

A. All of my life except two years when I was in the military.

* * *

Q. Mr. Carswell, where in Jacksonville did you grow up?

A. 1842 West 27th Street.

Q. And where is that in relation to the [66] home of Mr. Theodore Harris and his family, or the then home of Mr. Harris?

A. There were two houses between our homes.

Q. Where do you live now in relation to Mr. Harris' sister, Janice Fuller?

A. I guess about a mile, mile-and-a-half from her.

Q. What's your profession, Mr. Carswell?

A. I'm a minister.

* * *

[67] * * *

Q. Do you have a family, Mr. Carswell?

A. Yes, a 16-year-old son and a 15-year-old daughter.

Q. Do you know Theodore Harris?

A. Yes, I do.

Q. How long have you known Theodore?

A. All my life.

Q. Would you describe your relationship to Mr. Harris?

A. Well, we've always gotten along very, very well. Growing up we had a lot of fun together, a lot of laughs. We looked out all the time for each other and we were like family.

Anything I would ask him to do, he would do it. If he thought we were wrong, he would say no, we better not do that. That's the type of fellow he was, still is.

Q. Did you have the occasion to observe [68] Mr. Harris' relationship to his mother and his father and to other members of his family?

A. Yes, I did.

Q. Can you describe Mr. Harris' relationship to his family as you observed it over the years?

A. It was always good. It was very—it was a close-knit type family and everybody looked out for one another.

Q. Did Mr. Harris' family regularly attend church?

A. Yes, good grief.

Q. And did Theodore as well?

A. Yes.

Q. Did your friendship with Mr. Harris continue as you and he grew older?

A. Yes, it did.

Q. I take it that it saddened you when Mr. Harris was unable to stay out of criminal activity?

A. It did.

Q. You're aware of his convictions and his incarcerations?

A. Now I am.

Q. Did you ever observe Mr. Harris' [69] relationship with his wife, Christine?

A. Yes, I did.

Q. And his children?

A. Uh-huh.

Q. Can you describe your observations for us, please?

A. He always appeared—showed me where he was very much in love with his wife and the children, he cared very much for them. In fact, when he was not around me or something, you know, he would be—or I would carry him over to his family, that type thing. He always expressed his love for them.

* * *

[70] * * *

Q. Did you ever have occasion to employ Mr. Harris?

A. I did.

Q. And when was that?

A. It was in 1980, I believe, when he was home.

Q. When you say home, that means when he was released from prison; isn't that right?

A. When he was released from prison.

Q. And you knew about his prison sentence?

A. Sure did.

Q. When he came out, you had occasion to employ him, did you not?

A. Yes, I did.

Q. What was the nature of your business at that time?

A. At that time I was operating a janitorial service.

* * *

[72] * * *

Q. Mr. Carswell, in Miami, as you now [73] know, Mr. Harris was arrested and ultimately convicted of first degree murder. You're aware of that, are you not?

A. Uh-huh, uh-huh, yes, I am.

Q. In 1981 did anyone, Mr. Williams, Mr. Echarte, Mr. Wayne or anyone from the Public Defender's Office ever contact you to advise you of Mr. Harris' 1981 trial?

A. None.

Q. Did anyone ever ask you whether you would be available to serve as a witness on Mr. Harris' behalf?

A. No.

Q. Did anyone ever telephone you to inform you from the Public Defender's Office, to inform you about the progress of the case?

A. No.

Q. Did you, in fact, know when the trial was going to take place?

A. No.

Q. In 1981 would you have been willing to come to Miami to testify on Theodore's behalf?

A. I would have.

Q. Did anyone at any time in 1981 explain to you that for people who are charged [74] with first degree murder, there's both a guilt phase, a trial on the issues of guilt, and a sentencing

phase, and that at the sentencing phase family, friends and employers may all testify? Did anyone ever explain that to you in 1981?

A. No.

Q. Had you been asked at that time to testify, would you have come to Miami to do so?

A. Yes, I would have.

Q. And if you had been asked, would you have testified in essence as you have testified here today?

A. Yes, I would have.

Q. How do you feel about Mr. Harris?

A. He's an excellent fellow. You know, I think about him, and he's the type fellow that I would trust, even with my family. If I had to go on a trip or something in the ministry, I would trust him to take care of my family while I'm gone.

Q. And yet you know of his long criminal record?

A. Yes, but I know him.

MR. RABINOWITZ: I have no further [75] questions, Your Honor.

* * *

Trial Testimony of Janice Fuller

DIRECT EXAMINATION

BY MR. RABINOWITZ:

Q. Would you state your name for the record, please?
A. Janice Elaine Fuller.
Q. And where do you live?
A. 1842 West 26th Street, Jacksonville, Florida.
Q. And with whom do you live at that address?
A. My husband and children.
Q. Is your husband Hank Fuller—
A. Yes, he is.
Q. —who testified here earlier?
How many children do you have?
A. I have four, and two is at home.
Q. What are their names and ages?
A. LaShawn is 22, Dwayne is 20, [126] Nicholas is 19 and Kevin is 17.
Q. Are you the sister of Theodore Harris—
A. Yes, I am.

* * *

[127] * * *

Q. Are your parents living now?
A. No, they're not.
Q. Were they alive in 1981?
A. My father was.
Q. Your mother was not?
A. She passed in '79.
Q. But your father was alive?
[128] A. Yes, he was.
Q. Throughout the year of 1981?
A. Yes.
Q. Now, can you tell us about Theodore's relationship to your mother?
A. Well, it was good. With him being the baby of the family, he was close to her. He stayed, you know, at home until he got

married and after he got married they still was in contact. He would come by to see them. You know, it was a good relationship.

Q. And with his father?

A. It was the same, too. They could talk.

Q. In your view, were you close to your father until his death?

A. Very.

Q. Do you know whether anyone ever contacted your father in connection with this case?

A. No, no one did because I always handled everything for my father. I seen after him after my mother passed.

Q. And no one ever wrote to him?

A. No, not to my knowledge.

[129] Q. No one ever telephoned him?

A. Not to my knowledge, no.

Q. No one ever came to see him from the Public Defender's Office?

A. Not to my knowledge, no.

Q. Did anyone ever write to you or telephone you from the Public Defender's Office?

A. No.

Q. Did anyone from the Public Defender's Office ever come to see you?

A. No.

Q. Did anyone ever explain to you that first degree murder trials in Florida have two parts, a guilt phase and then a penalty phase, and that relatives and friends of the Defendant, even after he is convicted and even if they weren't witnesses at the time of the crime, may come and testify on his behalf at the penalty phase?

A. No.

Q. Did anyone ever sit down and—

A. Never told us anything, told me anything.

Q. Do you think that your father would have come to Miami in 1981?

[130] A. I believe he would have.

MR. GILBERT: Objection. Speculation.

THE COURT: Overruled.

Q. What kind of a brother was Theodore?

A. He was a good brother. That's all I can say, good, kind, loving and we was close.

Q. Did you have occasion to observe Theodore in his relationships with his own children, with his own child and with the other children of his wife, Christine?

A. Yes.

Q. Can you tell us a little bit about those relationships?

A. Well, really you couldn't tell a difference who was his child and who was the other kid because he treated them all the same, and I can remember a time before him and Chris was married when he used to bring Tesh to the house and he would babysit her, look after her himself.

* * *

[132] * * *

Q. And what was that relationship like?

A. It was still a good relationship as if it wasn't a separation, you know, they was still together.

Q. Now, Theodore has had a number of criminal convictions, hasn't he?

A. Yes.

Q. And he's had a hard time staying out of trouble, hasn't he?

A. True, yes.

Q. And, in fact, you're aware now that he's been convicted of a murder; isn't that right?

A. Yes, yes.

[133] Q. Has that made any difference to your love for Theodore?

A. No, no, it hasn't. I still love him.

Q. In 1981 did you feel the same way?

A. Of course I did.

Q. Had you understood the process and had you known when hearings would take place, would you have wanted to come and testify in 1981?

A. Yes.

Q. Would you have done so?

A. Yes, I would.

Q. How do you feel about not having been contacted by the Public Defender, by Theodore's lawyers, not having been told when the trial was going to be?

A. Well, I was shocked, hurt, because, you know, I didn't have the opportunity to say anything. The family didn't, you know. We just didn't. I was shocked.

Q. If you had been asked by them to come to Miami to testify on behalf of Theodore, would you have done so?

A. Yes.

[134] Q. Even understanding that he had been convicted of murder?

A. I still would have came.

Q. And what would you have said to the jury and to the judge?

A. Well, I would just answer the question that was put forth to me and told them he was my brother, the baby of the family, I love him, I care for him, I still do, and I would just, you know, put out his good qualities, because he does have good qualities.

Q. Along with his weak?

A. Yes, with his weak qualities. He is a good person.

Q. Have you had occasion to visit Theodore since his incarceration on the murder charge?

A. Yes, all the time.

Q. Out at Starke?

A. Well, after it start when he got to Starke when I knew I was on the visitors list.

Q. Do you correspond with him always?

A. All the time.

Q. Despite his conviction for murder, do you think that he has been a positive **[135]** influence on your own children?

A. Yes, he has.

Q. Can you explain that, even if it sounds contradictory?

A. Well, with the oldest boy he let him know just how rough it is, not just with Dwayne, but the other ones, too, how rough it is and to try to keep their life in order so they don't end up where he at.

With LaShawn, he spent a great deal of time talking with her. When she got out of high school, he told her not to stop there, go on to college, and she did. Good advice he gave her. Never negative, always positive.

Q. Can you tell us what you would have told that jury and that judge about what Theodore's life means to you?

A. It means a lot. I would, you know, plead to spare his life because it mean a lot to me, and that's really—just spare his life. I just want him to live.

Q. Even understanding that he would be living incarcerated for the rest of his life?

A. At least he's alive.

MR. RABINOWITZ: Okay. I have no [136] further questions.

* * *

Trial Testimony of Christine Harris

DIRECT EXAMINATION

BY MR. RABINOWITZ:

Q. Good morning. Would you state your name and address for the record?

A. Christine Harris, 9050 Falmouth Boulevard, Apartment 1818.

Q. Is that in Jacksonville?

A. Yes.

* * *

Q. Do you have children?

A. Yes, I have.

Q. What are their names and ages?

A. Catesha Harris, 17; Ted Harris, II, 15; Zaire Coleman, nine.

* * *

[104] * * *

Q. (By Mr. Rabinowitz) You were going to describe your efforts to locate a private lawyer.

* * *

A. Okay. I called several places trying to find—contact a lawyer for Ted, but I wasn't financially able to retain a lawyer.

Q. And, in fact, Mr. Harris was indigent, was he not?

A. Beg your pardon?

Q. He was indigent, was he not?

A. Yes.

Q. He had no money for the lawyer?

A. Right.

[105] Q. That's how the Public Defender came to be assigned to his defense; isn't that right?

A. Yes.

Q. Did you ever meet Mr. Williams or Mr. Echarte, Mr. Harris' court-appointed Public Defenders?

A. Yes.

Q. Can you tell us when that meeting took place?

A. It was at a hearing here in Miami. I had to ask the bailiff who Mr. Williams was.

I briefly talked with him in the hall to ask him what was happening, what was going on because I had took off of work to come here and no one told me that they had postponed it. And I was trying to talk to Mr. Williams, but like I say, I briefly talked with him a couple of minutes.

Q. So, if I can go back, you actually came from Jacksonville to Miami, taking off from work, in order to be present at what you thought was going to be a hearing in Mr. Harris' case?

A. Correct.

Q. But when you got here you found out—who had told you about this hearing? Was [106] that Mr. Harris?

A. No, my sister.

Q. Your sister?

A. Yes.

Q. That's—

A. Robin Smith.

Q. And no one from the Public Defender's Office had told you?

A. No.

Q. When you got here, however, you discovered that the hearing you had expected to be able to attend wasn't actually going to take place on that day?

A. Correct, yes.

Q. So then you went in search of Mr. Williams?

A. Correct.

Q. And how was it you were able to locate him?

A. From the bailiff outside. He told me who he was. As he was passing through the hall I stopped him and tried to talk with him.

Q. Did you introduce yourself as Mrs. Harris?

A. Yes, I told him who I was.

[107] Q. Mr. Harris' wife?

A. Yes, I told him who I was.

Q. What did Mr. Williams tell you?

A. He told me they had postponed it and he would get in touch with me. That was all. That was the conversation.

Q. Is that the only conversation you've had with Mr. Williams?

A. Yes.

Q. Did you leave Mr. Williams your telephone number at that time?

A. Well, at the time I didn't have a telephone.

Q. Did you give him a means for contacting you?

A. Well, my work number, I had a work number.

Q. And you gave it to him then?

A. Yes.

Q. Did you ever attempt to call Mr. Williams?

A. Yes.

Q. And were you ever able to get through to him?

A. No.

[108] Q. How long did Mr. Williams and you speak in this meeting?

A. A couple of minutes.

Q. Did he ask you questions about Mr. Harris' background?

A. No.

Q. Did he discuss your life with Mr. Harris?

A. No.

Q. Did he ask about the children?

A. No.

Q. Or the remainder of Mr. Harris' family?

A. No.

Q. Did you ever speak with him again?

A. No.

Q. Did he ever speak with you again?

A. No.

Q. Did he ever write to you?

A. No.

Q. Did you get any letters at all from the Public Defender's Office?

A. No.

Q. You had given him your address?

A. Yes.

[109] Q. Did you attend Mr. Harris' trial in September of 1981?

A. No.

Q. Why not?

A. No one contacted me and I were in the hospital at the time.

Q. Now, the woman who was killed was your sister's grandmother; isn't that right?

A. Yes.

Q. Does that make you sad?

A. Yes.

Q. Did it make you upset?

A. Yes.

Q. Was that a difficult point in your relations with your sister?

A. Yes.

Q. But at any time did that fact make you unwilling to come to be a witness for Theodore Harris?

A. No.

Q. Has your attitude towards Theodore Harris changed in any way between 1981 and the present?

A. No.

Q. Have you continued to be in contact **[110]** with Mr. Harris?

A. Yes.

Q. If you had been called or asked to come to Miami, would you have done so?

A. Yes.

Q. Did anyone explain to you, either Mr. Williams in your conversation with him or any one else, that family members who were not witnesses to a crime could nevertheless come to testify at a special trial on the issue of penalty?

A. No.

Q. Would you have wanted to do so—

A. Yes.

Q. —had the opportunity been available to you?

A. Yes.

Q. Despite the fact of your family connection with the woman who was killed in the murder?

A. Correct.

Q. Since Mr. Harris' conviction, have you and he stayed in touch?

A. Yes.

Q. If you had had the opportunity to [111] come to testify in 1981, what would you have told the jury and the judge at that time about Theodore after his conviction for the murder?

A. I would have told them the type of person—the warm, gentle person that I knew and the father of my—I say of my kids because he took—he taken Catesha and Zaire as his own, and that I didn't believe that he did this.

Q. You didn't believe that he actually had committed the murder then?

A. No.

Q. But even now when you've had more time to reflect, when we've talked about it, even assuming that he had committed the murder, would you still have come to testify?

A. Yes.

Q. And would you still do so if you had the opportunity to do so next week or next month?

A. Yes.

Q. And would you tell the jury in essence the good things that you know about Theodore's life?

A. Yes.

Q. And isn't one of the most important ones his role as a father to the children?

[112] A. Correct.

Q. What kind of letters do you and Theodore exchange at this point?

A. Very encouraging letters. He—sometimes when I'm down and out he lift me—he lifts my spirit. He gives me the will to go on.

Like I write him and tell him that things are not going right, just I feel like giving up on just day to day things that's happening, and he's the one that give me the spirit to go on.

Q. Does he write to the children as well?

A. Yes.

Q. And what sorts of letters—or do they share the letters with you sometimes?

A. Sometimes, yes.

Q. Sometimes they're private?

A. Right.

Q. Do you think the children still need him?

A. Yes, I do.

Q. Do you think that he plays, despite his criminal record, despite his convictions, [113] despite his incarceration, despite his conviction for murder, do you believe as their mother that he continues to play a positive role in his children's lives?

A. Yes, I do.

Q. Even if Mr. Harris were to remain incarcerated for the rest of his life, were he never to be paroled, do you believe that he would continue to play a positive role in your life and in the lives of the children?

A. Yes, I do.

Q. Is that what brings you here today?

A. Yes.

MR. RABINOWTIZ: I have no further questions.

* * *

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 81-7561

THE STATE OF FLORIDA,

Plaintiff,

vs.

THEODORE CHRISTOPHER HARRIS,

Defendant.

ORDER DENYING MOTION FOR POST-CONVICTION RELIEF

THIS CAUSE having come before this Court upon the motion of the defendant, THEODORE CHRISTOPHER HARRIS, for Post Conviction Relief, on June 6, 1988 at approximately 3:00 p.m., and continuing through June 7, 1988, and the court having reviewed the Record and Transcripts, having heard the testimony of witnesses, having reviewed the pleadings and being, otherwise, fully advised in the premises, it is hereby ORDERED AND ADJUDGED, as follows:

1. With regard to the allegations of ineffective assistance of counsel during the penalty phase of the trial for failure to discover and present mitigating evidence during the penalty phase of the trial (Issue A.a) and for an ineffective penalty phase summation (Issue A.b.), this Court finds that the defense trial counsel did not commit any deficiency below the standards expected of counsel.

Further, the testimony of the witnesses heard during this hearing would not, in any way, shape or form, have altered the verdict that the original jury reached.

Therefore, even if some act or omission of trial counsel could be considered to have been deficient, such deficiency could not have prejudiced the defendant.

2. With regard to the allegations of ineffective assistance of trial counsel during the guilt phase for counselling the defendant to waive his right to jury instructions on lesser-included offenses (Issue C.g.) and for failure to procure the services of experts (Issue C.h.), no evidence was presented that these acts constituted ineffectiveness of counsel and, in fact, the only evidence presented on the issue was that trial counsel was effective during the guilt phase of the trial. This Court finds that trial counsel was effective during the guilt phase of the trial.

3. Further, this Court finds, with regard to each of defendant's allegations of ineffective assistance of counsel, that defendant has not demonstrated that he was prejudiced thereby, as required by *Strickland v. Washington*, 466 U.S. 668 (1984).

4. No evidence was presented that the defendant was prejudiced in any manner by the alleged loss of the Public Defender's file and this motion is denied on that ground, as well. (Issue D).

5. Five (5) of the remaining fifteen (15) issues of the motion are barred on the grounds of res judicata, collateral estoppel and law of the case, having been previously ruled upon, against the defendant, by the Florida Supreme Court. Specifically, Issues A.c., C.a., C.b., C.d. and C.F. of the Motion.

6. The remaining ten (10) issues of the motion are procedurally barred because they were issues which could have and should have been raised on direct appeal, but were not and which were not properly preserved by request or objection at trial. Specifically, Issues A.d., A.e., A.f., A.g., A.h., B.a., B.b., B.c., C.c. and C.e. of the Motion.

DONE AND ORDERED at Miami, Dade County, Florida this 13 day of June, 1988.

/s/ Ellen J. Morphonios
JUDGE OF THE CIRCUIT COURT

cc: Daniel Rabinowitz
David Gilbert
Charles M. Fahlbusch